IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-192

NEW YORK GASLIGHT CLUB, INC., and JOHN ANDERSON, Manager of the New York Gaslight Club, Inc.,

Petitioners,

vs.

MS. CIDNI CAREY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the Order entered on May 8, 1979, by the United States Court of Appeals for the Second Circuit, which by a divided court, reversed the order and decision of the United States District Court for the Southern District of New York. The District Court had denied respondent's request for an award of attorneys' fees, under §706(k) of 42 U.S.C. §2000e-5(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.;* the fees claimed are for private legal representation in a New York State Administrative proceeding under the New York Human Rights Law, Article 15 Executive Law.

The Court of Appeals herein held in effect that a party who has succeeded in a New York State Administrative proceeding brought to enjoin unlawful discrimination in

employment has a Federal cause of action for the fees of private counsel who represented that party at the State level.*

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit filed May 8, 1979, has not yet been officially reported and is set forth in the Appendix hereto. The Memorandum Decision of the District Court filed on September 21, 1978 is set forth at A1.

The dissenting opinion of Judge William H. Mulligan, filed on May 8, 1979, is set forth at A15.

The opinion of Hon. Henry F. Werker, Judge of the District Court, is reported at 458 F.Supp. 79 as *Carey* v. *New York Gaslight Club, Inc.*, and is set forth in the Appendix hereto at A24.

Jurisdiction

The Order of the Court of Appeals was entered on May 8, 1979. No petition for rehearing was filed. The jurisdiction of this Court is based upon 28 U.S.C. §1254(1).

Questions Presented

1) Does §706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), create a Federal cause of action for attorneys fees (without regard to amount or diversity) for services rendered in State proceedings?**

* The memorandum decision of the District Court Judge denying counsel fees was filed September 21, 1978. However, an Order dismissing the complaint and marking the case off the calendar had previously been filed in the District Court on July 27, 1978. No appeal was taken from the order of dismissal. (A35)

** Respondent's counsel sought allowance of $8,200.00 below.

2) May the District Court, solely on the basis of vindication by New York State of a civil right, allow counsel fees to a party where New York Law makes no provision for such allowance?

3) May a plaintiff, whose complaint in the District Court for enforcement of her civil rights in employment and for compensatory damages has been dismissed, be regarded as a "prevailing party" for the purpose of awarding attorneys fees to her as a part of costs?

4) Does the statutory scheme of Article 15 of the Executive Law (Human Rights Law of the State of New York) afford adequate and comprehensive relief in conformity with congressional policy.*

Statement of the Case

This petition is based upon the following facts, which are not in dispute. On or about January 9, 1975, respondent filed a Complaint with the New York District Office of the Equal Employment Opportunity Commission ("EEOC"). That Complaint was then referred by the EEOC to The New York State Division of Human Rights following which on or about February 21, 1975 respondent filed her Complaint with the New York State Division of Human Rights charging that The Gaslight Club, Inc. (petitioner) was discriminating against her because of her race and color (A62).

On May 27, 1975 The New York State Division of Human Rights found probable cause and recommended a public hearing. The hearings were held on September 22, 1975 and January 15, 1976, resulting on August 13, 1976 of a

* Section 297(4)(a), New York Human Rights Law, requires the Human Rights Division to present the complainant's case at the administrative level.

finding of discrimination by The New York State Commissioner (A67).

On August 20, 1976 petitioner filed a Notice of Appeal from the Order of the Commissioner to The New York State Human Rights Appeal Board.

On August 26, 1977, The New York State Human Rights Appeal Board affirmed the decision of The New York State Division of Human Rights. In the meantime, on July 13, 1977 the EEOC had written to respondent declining to litigate her matter and enclosing a notice of her right to sue on her behalf, reserving the right of the Commissioner to seek status as intervenor in any such action which she might commence.

On September 20, 1977 respondent commenced an action in the United States District Court for the Southern District of New York. Her Complaint requested the identical relief which had already been granted to her in full by The New York State Division of Human Rights and affirmed by its Appeal Board; the Federal complaint also requested costs and attorneys' fees (A29).

The determination of The New York State Human Rights Appeal Board was affirmed without costs and without disbursements by Order of the Appellate Division of the Supreme Court, First Judicial Department, on November 3, 1977 on an appeal taken by petitioner, and leave to appeal was denied with Twenty ($20.00) Dollars costs in both the Appellate Division of the New York Supreme Court and in the New York Court of Appeals.

On July 28, 1978, the respondent's action in the United States District Court for the Southern District of New York was dismissed (see copy of Order of dismissal annexed hereto A35). A motion then pending brought on by the respondent for an award of counsel fees to pay her private counsel for representation in the State proceedings was decided on September 21, 1978 by Judge Henry F. Werker. He denied the motion. A motion to reargue that denial was denied on November 3, 1978. On November 28, 1978, the respondent appealed to the Circuit Court of Appeals for the Second Circuit from both decisions of Judge Werker.

On May 8, 1979, the United States Court of Appeals for the Second Circuit filed a decision (with a dissenting opinion) and order reversing the decision of Judge Werker and remanding the matter to the District Court for allowance of attorneys fees.

Reasons for Granting the Writ

The opinion (and dissenting opinion in the Court of Appeals for the Second Circuit) state that it is without precedent. It decided an important question which has not been but should be decided by this Court.

The decision of the Court of Appeals sanctioned a departure by the District Court from the requirement as a matter of law that it first conduct its own inquiry as to the claimed discriminatory employment practices before it could make any award of counsel fees to a prevailing party. The Court of Appeals thereby mandated full faith and credit to the New York State proceeding, notwithstanding that the congressional policies embodied in Title VII require that *res adjudicata* not be applied to state adjudication in the Civil Rights field. Moreover, the order dismissing the complaint (not on appeal) deprived the District Court of further jurisdiction to determine who is the prevailing party, thereby precluding any award of counsel fees.

The Court of Appeals has construed §2000e-5(k) contrary to the plain language and intent of the statute.

Argument Amplifying the Reasons Relied On

The decision of the Court of Appeals is contrary to applicable Federal law, *Fischer* v. *Adams,* 572 F.2d 406 (1st Cir. 1973); *Parker* v. *Califano,* 561 F.2d 340 (D.C. Cir. 1977); *Foster* v. *Boorstin,* 561 F.2d 340 (D.C. Cir. 1977); *Voutsis* v. *Union Carbide Corp.,* 452 F.2d 889 (2d Cir. 1971), *cert. denied,* 406 U.S. 918 (1972). Although Title VII provides that:

> "In any action or proceeding under this subchapter the Court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs. . ." (42 U.S.C. §2000e-5(k)).

the Court of Appeals directed the award of attorneys' fees to complainant herein, who prevailed, not in a Title VII proceeding within the Federal remedial framework, but rather in a state agency proceeding. The New York State Law makes no provision for the compensation of private counsel, but provides agency counsel at no expense to the complainant. The attorneys' fee provision of the Civil Rights Act of 1964, incorporated in the Civil Rights Attorneys' Fee Awards Act of 1976, 42 U.S.C. §1988, explicitly authorizes the District Court, in its discretion, to award reasonable attorneys' fees as part of the cost of bringing an action to enforce several civil rights statutes, only where that action was commenced and maintained to conclusion in the Federal Court. *Mid-Hudson Legal Services, Inc.* v. *G. & U. Corp.,* 578 F.2d 34, 37 (2d Cir. 1978).

In the case of *Batiste* v. *Furnco Construction Corporation,* 503 F.2d 447, reversing 350 F.Supp. 10, *cert. denied,* 95 S.Ct. 1127, 420 U.S. 928, the Court of Appeals for the 7th Circuit held that *res adjudicata* is inapplicable to

claims under the equal employment opportunities title to the Civil Rights Act of 1964, §706(c), 42 U.S.C. §2000e-5 (c), 28 U.S.C.A. §1738. In order to award counsel fees to the prevailing party, the Circuit Court in *Batiste* noted that the District Court must make its own determination based upon all of the pertinent evidence, resulting in new findings. Only then could the matter of an award of attorneys' fees to a prevailing party be considered by the District Court in its discretion. The effect of the prior dismissal of the complaint herein is tantamount to no action ever having been commenced in the Federal Court. Thereafter, the District Court lacked the power to try the issue of whether or not the discriminatory employment practice was in fact unlawful. The question of jurisdiction of the District Court may be raised at any stage of the litigation and is properly before this Court.

The Court of Appeals erroneously construed 42 U.S.C. 2000e-5(k) so as to define the words "proceedings under this subchapter" as including within their purview a New York State Administrative proceeding. However, where Congress intended in the Civil Rights Act to refer to proceedings under state or local law, Congress clearly so described them. For example, see 42 U.S.C. 2000e-5(c) subdivision (k) which appears to relate to proceedings in which the Commissioner or the United States may be a party, viz., a proceeding by the Commissioner to compel compliance with a court order in a Civil action referred to in the two preceding subdivisions, i.e., (i) and (j). See also Title 42 §1988 U.S.C.A. entitled: "Proceedings in Vindication of Civil Rights"; which equates "proceedings" with the trial and disposition by the district courts of civil and criminal matters for vindication of civil rights. There is no clear congressional intent to create a right in favor of a party who prevailed at the state or local level, to apply to a Federal court for an award of counsel fees other than in

a Federal lawsuit to enforce civil rights or in a proceeding brought by the Commissioner or the United States to enforce a court order in a civil action or criminal proceeding.

In support of the novel theory established in this case by the Court of Appeals, it cites various cases in which attorneys' fees were awarded by the courts for work done in Federal administrative proceedings. In each of those cases, the Federal employee who sought the award claimed discrimination by a Federal agency. That agency did not provide counsel for the claimant and was in fact the adversary of the complainant at all stages of the proceedings. Generally, federal agencies do not supply counsel to a Federal employee who has a discriminatory employment practice complaint against a Federal agency. However, in the case at bar, the State of New York provided her with investigational and legal representation at no cost to her. It is not in dispute that at no stage of the litigation in the New York State proceeding did any conflict of interest appear between the respondent-complainant and the New York State Division of Human Rights. The Court of Appeals relied upon the *amicus curiae* argument offered by counsel for the New York Division of Human Rights in support of the position of the respondent-claimant. That argument is based upon mere conjecture that there may be cases in which representation by counsel supplied by the Division may not be adequate for claimant. Since that argument was inapplicable to the facts herein, reliance thereon by the Court of Appeals was misplaced. The same hypothesis argued by the respondent-claimant fails for the same reason. It is not claimed that the Division at any time failed in its responsibility to her so there is no basis for the finding by the Court of Appeals of a real need on the part of the claimant to retain private counsel at the State administrative level.

The legislative intent of Title VII makes it abundantly clear that where, as here, there is adequate State protection to process these claims, the complainant must process them through the State and not resort to the Federal Government. A complainant proceeding in accordance with the intent of Congress in Title VII so construed would not result in needless litigation in the Federal courts. To hold otherwise and expand the coverage of Title VII contrary to the intent of Congress might, as Judge Werker held, lead to use of the federal courts as a procedural conduit through which otherwise unwarranted relief could be obtained, leading to massive waste of judicial and administrative resources, clearly a result to be avoided.

The Minority Opinion points to the burden which the Court of Appeals would impose on the district courts. But, let us carry that opinion one step forward. The complaint of the New York Human Rights Division on behalf of respondent Carey, charged one, Ray Angelic, with unlawful employment discrimination. Since the charges against Angelic were dismissed after the public hearing (A69, 70), he was also a "prevailing party" in the administrative proceeding. Equal protection of the law requires that the Majority Opinion—if it be allowed to stand, should be extended to Angelic (his right surpasses hers since the New York Human Rights Law provided her with cost-free counsel but gave no such protection to him). Does it not follow that he too could seek an allowance for his counsel fees to be charged against the respondent Carey by intervening in her Federal suit or by a separate action? Thus, a further burden would be imposed on the district courts which would be required to pass upon applications of persons in situations similar to that of Angelic.

We agree with Judge Mulligan that remuneration of private counsel successful in state agency and state judicial

proceedings in vindicating rights under state law should be determined by the law of the state which established the substantive right, created the agency and provided for judicial review. Judge Mulligan concluded that New York State provides full protection for the civil rights claimant; that Judge Werker properly denied the award of counsel fees to respondent; that the record in this case established that respondent's attorneys never requested, as permitted by §297(4)(a) of the New York State Human Rights Law, the right to present the case solely on behalf of the complainant with the consent of the Division.

The "American rule" is that attorneys' fees are not ordinarily recoverable by the prevailing litigant in Federal litigation, and in the absence of statutory authorization, such fees could not be awarded under a "private Attorney General" approach. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612. It follows that the award of counsel fees in Civil Rights cases is limited to the provision of the relevant statute, see §2000e-5(k) and discussion in *Parker* v. *Califano*.

42 U.S.C. §2000e-5(k) clearly does not provide for the award of counsel fees to a litigant in a State administrative proceeding who voluntarily retained the services of private counsel rather than utilize the services of counsel provided by the State.

The New York Human Rights Law and the procedure which that statute provides to carry it into effect are entirely consistent with Federal policy. They afford complete relief at the State level. There is no clear congressional intent to superimpose Federal law mandating the award of attorneys' fees for services rendered in State administrative proceedings under its Civil Rights Laws when that State has afforded adequate and comprehensive relief to eliminate unlawful discrimination in employment. The

Federal law compliments the New York State Law on the subject of civil rights in cases of alleged discriminatory employment practices by providing for a civil action in the Federal courts, if necessary, to compel compliance with the State administrative decision. In such a civil action, after trial and determination as to who is the prevailing party and the extent of his or her success, the court in its discretion may, as part of the costs, allow that party a reasonable attorneys' fee. The Federal Civil Rights Act of 1964 should not have been extended by judicial interpretation of the Court of Appeals herein to include an award of counsel fees under the circumstances of this case.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 1, 1979

APPENDIX

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Majority Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 743—August Term, 1978.

(Argued March 9, 1979 Decided May 8, 1979.)

Docket No. 78-6703

MS. CIDNI CAREY,

Plaintiff-Appellant,

v.

NEW YORK GASLIGHT CLUB, INC., and JOHN ANDERSON, Manager of the New York Gaslight Club, Inc.,

Defendants-Appellees.

Before:

SMITH, MANSFIELD and MULLIGAN,

Circuit Judges.

Appeal from denial of attorney's fees under § 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), in the Southern District of New York, Henry F. Werker, *Judge*. Opinion reported at 458 F. Supp. 79 (1978). Reversed and remanded.

JAMES I. MEYERSON (N.A.A.C.P., New York, N.Y., Nathaniel R. Jones and George E. Hairston, of counsel), *for Appellant.*

Majority Opinion of United States Court of Appeals for the Second Circuit

ADELE GRAHAM (Ann Thacher Anderson, General Counsel, State Division of Human Rights, State of New York, of counsel), *for Amicus Curiae.*

MARVIN LUBOFF (Kane, Kessler, Proujansky, Preiss & Nurnberg, P.C., New York, N.Y., Albert N. Proujansky, of counsel), *for Appellees.*

SMITH, *Circuit Judge:*

This is an appeal from dismissal by the United States District Court for the Southern District of New York, Henry F. Werker, *Judge,* of an action for attorney's fees under 42 U.S.C. § 2000e-5(k). We find error and reverse and remand for allowance of attorney's fees.

This is a case of first impression involving the right of a successful party to collect attorney's fees under Title VII of the Civil Rights Act of 1964, U.S.C. § 2000e *et seq.*, for proceedings at the state administrative level. Based on the statutory scheme of Title VII, the legislative history and public policy, we reverse the denial below of an attorney's fee award, and hold that such a successful party is entitled to counsel fees under Title VII.

Facts

Appellant Cidni Carey applied for a position as a waitress with appellee New York Gaslight Club, Inc. in 1974. She was not offered a job. Believing that she was denied a position because of her race, Carey filed a complaint with the New York office of the Equal Employment Opportunity Commission ("EEOC").

Majority Opinion of United States Court of Appeals for the Second Circuit

Carey's complaint was referred to the New York State Division of Human Rights by the EEOC, in accordance with the statutory scheme of deferring to state mechanisms for resolving discrimination charges under Title VII. 42 U.S.C. § 2000e-5(c). Carey then filed a formal complaint with the state Division of Human Rights, at that agency's request. The state agency made a finding of jurisdiction and probable cause that unlawful discrimination had taken place. After conciliation efforts had failed, Carey's case was recommended for a public hearing. A hearing was held, concluding in January, 1976.

In August, 1976 the Division of Human Rights issued an order finding that the Gaslight Club had unlawfully discriminated against Carey on the basis of her race. The Division also directed the Club to offer Carey a waitress position and to award her back pay. The Gaslight Club appealed this order to the New York State Human Rights Appeal Board, which affirmed the finding of discrimination and order for relief. This decision was also affirmed by the Appellate Division of the New York Supreme Court. 59 App. Div.2d 852, 399 N.Y.S.2d 158 (1st Dept. 1977). The New York Court of Appeals subsequently denied leave to appeal in February, 1978. 43 N.Y.2d 648, 403 N.Y.S.2d 1026 (1978).

The EEOC was not directly involved in any of the state proceedings dealing with Carey's complaint. Carey's counsel[1] communicated with the EEOC to inform that

[1] We note in passing that Appellant Carey was represented in the state proceedings and in federal court by attorneys on the staff of the National Association for the Advancement of Colored People ("N.A.A.C.P."). The fact that counsel in this case worked with a public interest organization rather than a private firm of course does not affect the application of § 706(k) of Title VII, 42

office of the course of the state proceedings. In July, 1977 Carey received a Notice of Right to Sue Letter from the EEOC. Within the statutorily required 90-day period,[2] Carey filed a suit in federal district court.

In the district court, the only issue presented by Carey was the award of attorney's fees based on her success at the state administrative level, following referral to the state agency by the EEOC. Judge Werker denied the request for attorney's fees, holding that Carey could have been represented by a state-provided attorney if she had wished, and that the filing of a federal court suit while the state administrative claim was still pending did not warrant an award of attorney's fees. For the reasons below, we reverse and remand for consideration of an award of counsel fees.

Discussion

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e *et seq.* The statute sets forth a detailed scheme of enforcement by the Equal Employment Opportunity Commission. 42 U.S.C. § 2000e-5.[3] Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), provides that

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U.S.C. § 2000e-5(k), since attorney's fees under that section are awarded to public interest lawyers in the same manner as to private attorneys. *Reynolds* v. *Coomey,* 567 F.2d 1166, 1167 (1st Cir. 1978); *Rios* v. *Enterprise Association Steamfitters Local 638 of U.A.,* 400 F. Supp. 993, 996 (S.D.N.Y. 1975), *aff'd* 542 F.2d 579 (2d Cir. 1976), *cert. denied,* 430 U.S. 911 (1977).

[2] 42 U.S.C. § 2000e-5(f)(1). *See* note 3, *infra.*

[3] Pursuant to 42 U.S.C. § 2000e-5(c)-(d), a person who wishes to allege discrimination in violation of Title VII must file a

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs. . . .

The purpose of this provision for counsel fees is to facilitate the bringing of individual complaints in order to "effectuate the congressional policy against . . . discrimination." *Johnson* v. *Georgia Highway Express,* 488 F.2d 714, 716 (5th Cir. 1974). *See also, Christianburg Garment Co.* v. *Equal Employment Opportunity Commission,* 434 U.S. 412, 418 (1978). Such a statute which provides for attorney's fees awards in civil rights cases is aimed at enforcing congressional mandates against discrimination through private actions and should be read "broadly to achieve its remedial purpose." *Mid-Hudson Legal Services, Inc.* v. *G & U, Inc.,* 578 F.2d 34, 37 (2d Cir. 1978).[4]

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complaint with his or her state or local equal opportunity agency, if such an agency empowered to "grant or seek relief" exists, before the Equal Employment Opportunity Commission may act on it. The state agency then has 60 days in which to process the complaint, after which time the complainant may file a charge with the EEOC. The EEOC then attempts to conciliate the discrimination charge, and may itself bring action against the alleged violator. If the EEOC does not conciliate or take action against the employer, the Commission issues a "Notice of Right to Sue" letter to the complainant, who may then file an action in district court within 90 days. 42 U.S.C. § 2000e-5(f).

[4] Though *Mid-Hudson Legal Services* involved the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, rather than Title VII, there are useful comparisons to be drawn between the two attorney's fees provisions. According to the Senate Report on the Civil Rights Attorney's Fees Awards Act, the language of that act "follows the language of Titles II and VII of the Civil Rights Act of 1964," 1976 U.S. Code Cong. & Ad. News 5910, and "[i]t is intended that the standards for awarding fees [in that

Though § 706(k) on its surface provides for awards of counsel fees at the court's discretion, the policy developed by the Supreme Court favors awards of fees to successful plaintiffs unless there are special circumstances which would render such an award unjust. *See Christianburg Garment Co., supra,* 434 U.S. at 416-17. This approach stems from a recognition that it is in the public interest to aid Title VII enforcement through private actions, and a liberal reading of the attorney's fees provision encourages this effort. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 415 (1975), *citing Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968) (per curiam), *and Northcross* v. *Memphis Board of Education,* 412 U.S. 427 (1973) (per curiam). *Accord Rios* v. *Enterprise Association Steamfitters Local 638 of U.A.,* 400 F. Supp. 993, 995 (S.D.N.Y. 1975), *aff'd* 542 F.2d 579 (2d Cir. 1976), *cert. denied,* 430 U.S. 911 (1977).

The issue in this case, then, is whether the general policy of awarding attorney's fees to successful plaintiffs in Title VII actions envisions an award to a party who is successful in pursuing her claim before the state human rights agency without having to pursue her case in federal court. There is no real question that Carey prevailed on the merits before the Division of Human Rights.[5] The question is whether § 706(k) encompasses fee awards to complaining parties who succeed at a step in the statutory scheme before they are forced to litigate their claims in federal court.

Deference to state mechanisms for resolving discrimination complaints is an integral part of the enforcement

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Act] be generally the same as under the fee provisions of the 1964 Civil Rights Act." *Id.,* at 5912.

[5] *See Foster* v. *Boorstin,* 561 F.2d 340, 342-43 (D.C. Cir. 1977).

process under Title VII, 42 U.S.C. § 2000e-5(c), and submission to state remedies is a jurisdictional prerequisite to EEOC action. *See Equal Employment Opportunity Commission* v. *Union Bank,* 408 F.2d 867, 869 (9th Cir. 1968). The statutory framework of Title VII embodies a "federal mandate of accomodation to state action." *Voutsis* v. *Union Carbide Corp.,* 452 F.2d 889, 892 (2d Cir. 1971), *cert. denied,* 406 U.S. 918 (1972). Thus, there can be concurrent jurisdiction over a complaint by the EEOC and the state agency, *Voutsis, supra,* 452 F.2d at 892. In addition, oral referral to a state agency of a complaint filed with the EEOC acts to place the complaint in "suspended animation" until the state has terminated proceedings and "fully complie[s] with the intent" of Title VII. *Love* v. *Pullman Co.,* 404 U.S. 522, 525-6 (1972).

As explained in *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 44 (1974), the enforcement procedures in Title VII were designed to

> assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin. . . . Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit. (Citations omitted.)

Thus, state human rights agencies play an important role in the enforcement process of Title VII, since they afford a chance to resolve a discrimination complaint in accordance with federal policy before such a complaint reaches the federal courts.

The language of § 706(k) refers to attorney's fees awards in "any action or proceeding under this subchapter." The subchapter does include the description of deferral to state agencies by the EEOC, and uses the term "proceeding" to describe the state processes. 42 U.S.C. § 2000e-5(c). In light of this, and in light of the use of both "action" and "proceeding" in § 706(k),[6] the language of the statute is broad enough to encompass awards of counsel fees for work done in connection with administrative proceedings following referral to a state agency by EEOC.[7]

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[6] Statutes should be interpreted whenever possible so as not to render any clause, sentence or word superfluous or redundant. *Rockbridge* v. *Lincoln*, 449 F.2d 567, 571 (9th Cir. 1971).

[7] The legislative history of § 706(k) is not particularly enlightening as to the meaning of "action" or "proceeding." *See* Appendix in *Parker* v. *Califano*, 561 F.2d 320, 333 (D.C. Cir. 1977). It is true, however, that the attorney's fees provision was left untouched during the 1972 amendment process to Title VII. Additionally, the legislative history of the enforcement scheme embodied in § 706 talks favorably of the need for administrative tribunals to resolve discrimination complaints, and refers to state fair employment practice commissions as well as federal agencies in this regard. 1972 U.S. Code Cong. & Ad. News 2145-47.

The legislative history of the 1976 Civil Rights Attorney's Fees Awards Act (see note 4, *supra*) also notes that a prevailing party need not have succeeded in a courtroom context to obtain compensation for counsel fees:

> [F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. 1976 U.S. Code Cong. & Ad. News 5912.

Other circuits favor a broad reading of the attorney's fees provisions of Title VII to include compensation for work done in administrative proceedings. *Fischer* v. *Adams*, 572 F.2d 406 (1st Cir. 1978); *Parker* v. *Califano*, 561 F.2d 320 (D.C. Cir. 1977); *Foster* v. *Boorstin*, 561 F.2d 340 (D.C. Cir. 1977). *Accord*, *Noble* v. *Claytor*, 448 F. Supp. 1242 (D.D.C. 1978); *Smith* v. *Califano*, 446 F. Supp. 530 (D.D.C. 1978); *McMullen* v. *Warner*, 416 F. Supp. 1163 (D.D.C. 1976). While these cases deal with federal employees involved in federal agency procedures, their reasoning supports a similarly favorable result for complainants who succeed in state administrative proceedings pursuant to Title VII.[8]

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[8] In *Parker* v. *Califano*, 561 F.2d 320 (D.C. Cir. 1977), Judge Wright examines the legislative history and statutory framework of Title VII and concludes that a federal district court has authority to award attorney's fees that include compensation for work done in related administrative proceedings. In discussing the statutory language of § 706(k), which is incorporated into § 717 of Title VII dealing with complaints filed by federal employees, he notes the observation in *Johnson* v. *United States*, D.Md. Civil Action H-74-1343 (June 8, 1976) slip op. at 7, *aff'd* 554 F.2d 632 (4th Cir. 1977):

> Had Congress wished to restrict an award of an attorney's fee to only suits filed in court, there would have been no need to add the words "or proceeding" to "any action." But "proceeding" is a broader term than "action" and would include an administrative as well as judicial proceeding. 561 F.2d at 325.

The court in *Parker* goes on to hold that the general enforcement scheme of Title VII would be "seriously impinge[d]" upon by a narrow interpretation of the attorney's fees provision which would preclude compensation for work done on the administrative level. Such an approach to the award of attorney's fees under Title VII

> clashes sharply with the clearly perceived structure and aims of the Title. From the passage of the Civil Rights Act of 1964, the Title VII enforcement scheme has included both

While the complaint resolution process may be factually different for federal complainants than for private employees, the policy reasons for allowing attorney's fees awards for work done on the administrative level are similar for federal and private employees who claim discrimination in violation of Title VII.

First, the fact that the opposing party in an administrative hearing will most likely be represented by an attorney is as true in the case of an individual filing a charge against a private employer as it is in the case of a federal employee. *See Parker* v. *Califano, supra,* 561 F.2d at 332. In the case of a private employer, the disadvantage at which an individual employee who is not represented by counsel would be placed in a state administrative hearing is potentially every bit as great as that of a federal employee confronting a United States agency.

Judge Werker ruled below that the need to award attorney's fees in the case of private individuals was not as pressing as in the case of federal employees, since a private complainant appearing before the New York Division of Human Rights could have the option of being represented by counsel provided by the Division. In this regard, he cited § 297(4)(a) of the New York Executive Law (Human Rights), McKinney 1972, which provides that the "case in support of the complaint shall be presented by one of the attorneys or agents of the [D]ivision."

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administrative proceedings and judicial actions. 561 F.2d at 331.

Therefore, according to this analysis, the provision for attorney's fees should be read to include both phases of the enforcement process.

We disagree with this conclusion. A brief filed before this court by the New York Division of Human Rights as *amicus curiae* points out that the statute provides for Division lawyers to present the case "in support of the complaint," not in support of the plaintiff. Thus, there may be cases in which the position of the Division lawyer is not the same as that of the complaining party. In addition, as noted by the Division, state attorneys are available to represent complaining parties only at the public hearing stage of the administrative process. In the earlier investigative stage no Division attorney is provided to represent a private employee and in the later appellate stage a Division attorney, if one appears, does so as an advocate of the decision rendered by the New York State Division of Human Rights or of the Appeal Board, which may have denied the employee's claim or granted less relief than the complainant sought.

The need to retain private counsel at the state administrative stage in a Title VII claim is therefore real. If no counsel is present to represent a complainant at the investigative stage, her complaint may never receive a public hearing because there may be no finding of probable cause or jurisdiction. And if a plaintiff cannot obtain representation at the appellate stage, she may be deprived of review of her claim, and may be forced to pursue her case in federal court even where a resolution through state mechanisms might be possible.[9]

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[9] Despite the implications of the dissent, the productive role played by private counsel is apparent in this case. First, as admitted by the dissent, no Division counsel participated in the initial hearing on Carey's case before the New York State Division of Human Rights. It is precisely at this first stage that a case charging discrimination may be won or lost, since it is at this

Second, denial of awards of attorney's fees for administrative proceedings may encourage needless litigation.[10] As noted in *Smith* v. *Califano, supra,* 446 F. Supp. at 534:

> a party who knew he could recover all fees once he got to court but would recover none if he prevailed at the administrative level would rush to court . . . rather than wait for a final agency decision. . . . Thus, the administrative proceeding [required by Title VII]

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stage that a fact-finder develops findings which will be given great deference at later stages of the litigation. We do not agree with the dissent's suggestion that Carey should have waited to see if the Division attorney could win her case for her before retaining private counsel. If the complainant had lost in the initial hearing stage, she might have been in the position of having the Division attorney represent the *defendants* against whom she brought the complaint in later proceedings, as the prevailing party below. The establishment of a favorable record in the initial stage is crucial, and so plaintiffs should not be penalized for wishing to obtain representation through retained counsel from the beginning of the proceedings.

The record also supports the conclusion that it was Carey's retained counsel, and not the Division attorney, who pressed her case at all levels. In various orders and records of the proceedings, it was noted that retained counsel represented Complainant Carey, while Division attorneys represented "the Division" (Order of Commissioner Kramarsky, August 13, 1976), "the Commissioner's Order" (Order of State Human Rights Appeal Board, August 26, 1977) and "the State Division" (Order of Appellate Division of New York Supreme Court).

Additionally, there is no evidence to contradict the affidavit of retained counsel that he was "almost solely responsible for the prosecution and preparation of the state administrative and judicial proceedings, on behalf of the Plaintiff." Given these facts, we cannot agree with the dissent that the function served by retained counsel was in any way superfluous or unnecessary.

[10] Acts awarding attorney's fees should not be interpreted so as to "encourage plaintiffs to try cases in which reasonable settlement offers have been received, merely to ensure a fee award." *Gagne* v. *Maher,* —— F.2d ——, slip op. at 1603 (2d Cir., March 9, 1979).

> might be relegated to a pro forma exhaustion step decreasing the likelihood that claims could be resolved without resorting to the courts.

Awards of attorney's fees for administrative work furthers the congressional policy of resolving discrimination complaints before they reach the federal courts just as effectively in cases involving state agencies as in those involving federal agencies. Given the compromise worked out by Congress to provide some deference to state dispute resolution mechanisms, *see Voutsis* v. *Union Carbide Corp., supra,* 452 F.2d at 891-92, an interpretation of the attorney's fees provision which favors parties who are successful in state administrative proceedings to the same extent as those who prevail in court is consistent with the legislative intent just as is allowing counsel fees in the context of federal administrative proceedings.

Finally, the importance of providing an incentive for a a complete development of the administrative record is as relevant to state administrative proceedings as to federal ones. *See Smith* v. *Califano, supra,* 446 F. Supp. at 534. If a complaining party is reluctant to present her case fully before a state agency for fear that success at that level would deprive her of an attorney's fee award, the federal courts will not have the benefit of a complete record below when reviewing the case. Thus, courts will have to expend time and energy which might be unnecessary if plaintiffs had an incentive to develop a full administrative record.

The cases cited by appellees for the proposition that attorney's fees under Title VII may be awarded only for success in a courtroom context are not applicable to the case at bar. Neither *Pearson* v. *Western Electric Co.,* 542

F.2d 1150 (10th Cir. 1976), nor *Williams* v. *General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974), deals with a party who prevailed in administrative proceedings undertaken pursuant to the requirements of Title VII. To the extent that the language of those cases limits recovery of attorney's fees under Title VII to parties who succeed in a court, it is inconsistent with the reasoning of the cases we have cited in the area and we decline to adopt that limitation. *See Fischer* v. *Adams, supra* 572 F.2d 406; *Parker* v. *Califano, supra,* and cases cited therein, 561 F.2d at 324 n. 13; *Drew* v. *Liberty Mutual Insurance Co.*, 480 F.2d 69 (5th Cir. 1973), *cert. denied,* 417 U.S. 935 (1974).

A complaining party who is successful in state administrative proceedings after having her complaint under Title VII referred to a state agency in accordance with the statutory scheme of that Title is entitled to recover attorney's fees in the same manner as a party who prevails in federal court. We reverse and remand for further proceedings not inconsistent with this opinion.

Dissenting Opinion of Circuit Judge William H. Mulligan

MULLIGAN, *Circuit Judge,* dissenting:

The majority concedes that its holding is without precedent. The appellant successfully established employment discrimination on the basis of race and color in violation of the New York State Human Rights Law in state agency administrative proceedings where she was provided legal counsel in support of her complaint. She is now permitted to recover attorney's fees for additional legal counsel whom she privately retained for those proceedings. The fee recovery is permitted in a federal action where the only issue presented to the district court is the propriety of an award of such fees.[1] Remarkably, the decision is in part justified by the majority on the ground that it will discourage needless litigation. I respectfully dissent.

Title VII mandated that the initial complaint made by Ms. Carey to the Equal Employment Opportunity Commission (EEOC) be referred to the New York State Division of Human Rights (the Division). 42 U.S.C. § 2000e-5(c). I agree with the majority that the clear congressional purpose underlying that mandatory referral was to utilize existing state and local equal opportunity agencies in order to settle such disputes at the state level before involving the federal courts. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *Love* v. *Pullman Co.*,

[1] The majority speaks of this as an action to recover attorney's fees "at the state administrative level." However, the affidavit of counsel seeks 16 hours ($1600) for appearances in the appellate courts of New York. Of the total of 82 hours expended counsel seeks recompense for some 22 hours for the preparation of memoranda and affidavits in support of the application for attorney's fees.

404 U.S. 522, 526 (1972). In this case the Division investigated the charge of the complainant, made a finding and determination of probable cause and conducted a public hearing. Carey was successful on the merits, winning an award of compensatory damages based on back pay as well as an order directing that she be employed. The employer appealed to the State Human Rights Appeal Board which sustained the order of the agency. The Appellate Division affirmed and the New York Court of Appeals refused leave to appeal as set forth in the majority opinion. We note that the discrimination found by the agency and sustained by the courts of New York was a violation of the New York Human Rights Law. N.Y. Executive Law, Article 15 (McKinney's 1972).

It seems to me to be fundamental that remuneration of private counsel successful in state agency and state judicial proceedings in vindicating rights under state law should be determined by the law of the state which established the substantive right, created the agency, and provided for judicial review. The State of New York has hardly been indifferent to the evil of racial discrimination in employment. Its relevant remedial procedures predated Title VII by nearly 20 years and are derived from legal antecedents enacted as early as 1909. See N.Y. Executive Law (Human Rights Law) § 297, historical note at 305-06 (McKinney's 1972). It is true that the State of New York has made no statutory provision for recovery of private counsel fees in these cases and it is not disputed that no such award is judicially sanctioned in that State. *State Division of Human Rights* v. *Gorton,* 32 A.D. 2d 933, 302 N.Y.S. 2d 966 (2d Dep't 1969). Nevertheless, New York has devised a procedure to satisfy the complainant's need

for counsel in an employment discrimination action. Section 297(4)(a) of the Human Rights Law provides in pertinent part:

> The case in support of the complaint shall be presented by one of the attorneys or agents of the division and, at the option of the complainant, by his attorney. With the consent of the division, the case in support of the complainant may be presented solely by his attorney.

The complainant here was without funds to pay for counsel and retained the services of attorneys employed by the N.A.A.C.P. Special Contribution Fund, Inc. There is nothing in the record before us to indicate any request by these attorneys to present the case solely on behalf of the complainant with the consent of the Division as permitted by the last sentence quoted in section 297(4)(a). The record establishes that the Division assigned an investigator to look into the charges. The Division subsequently found that jurisdiction existed and that there was probable cause to believe that the employer had engaged in an unlawful discriminatory practice in violation of the Human Rights Law. At the ensuing public hearing the complainant was represented by her privately retained attorney and the Division by one of its counsel.[2] On the appeal the complainant was again privately represented and again the Division provided counsel who argued and

[2] The Division attorney admittedly was not active in assisting the presentation of Carey's case at this stage of the proceeding. This occurred, however, because of Carey's voluntary decision to retain independent counsel to handle that presentation. See 9 N.Y.C.R.R. § 465.11.

submitted a brief on Carey's behalf. In all subsequent state legal proceedings this dual representation continued. There is not the slightest hint in the record that at any point the interest of the Division in successful prosecution of the complaint diverged from Carey's interests as complainant. On these facts I believe Judge Werker properly denied an award of counsel fees to the appellant.

I continue to adhere to the view I expressed in *Mid-Hudson Legal Services, Inc.* v. *G. & U. Corp.*, 578 F.2d 34, 37 (2d Cir. 1978), that attorneys who are acting as "private attorneys general" in the civil rights field should receive reasonable compensation for their services. In that case we were construing the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, which explicitly authorizes the district court in its discretion to award reasonable attorney's fees as part of the cost of bringing an action to enforce any of several civil rights statutes. See 578 F.2d at 36 & n.1. The action there was commenced in the federal court and the fees to be awarded involved services performed in a federal tribunal. Here the only federal court procedure involved is the instant action. This suit raises only the issue of counsel fees to be awarded in *state* administrative and judicial proceedings which granted the complainant the full relief requested and which made no provision for compensation for private counsel, presumably because the governing statutory scheme provided state counsel at no expense. Thus, I cannot sensibly characterize these private counsel as private attorneys general whose efforts must be subsidized by defendants in order to encourage plaintiffs injured by racial discrimination to seek legal relief. Compare, e.g., *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-02 (1968).

Title VII does provide that:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . .

42 U.S.C. § 2000e-5(k). The complainant here, however, prevailed not in a Title VII proceeding within the federal remedial framework, but rather in a state agency proceeding which provides agency counsel at no expense to the complainant and makes no provision for the compensation of private counsel. Since Congress insisted in Title VII that existing state agency procedures be utilized and New York had followed its procedure long before enactment of the federal scheme, I cannot find in the language or legislative history of Title VII any intent to permit the federal courts to be utilized in connection with such state proceedings merely as a fee dispensing agency. Such a course only promotes the federal litigation which Congress intended to bypass. Had the Congress intended this unusual result —the awarding by federal courts of attorney's fees not incurred in the federal framework—it could and surely would have explicitly so provided.

The majority argues that the need to retain private counsel at the state level is "real." However, the proper response to that need is a matter for the state legislature to determine, not the federal courts. Moreover, whatever the need for private counsel may be in certain situations, none of the alleged inadequacies in the state approach noted by the majority are present in this case. The majority notes that in the investigative stage no Division attorney is assigned to represent a private employee. However, a Divi-

sion investigator was assigned here and a finding of probable cause was made. There was no suggestion by Carey of any inadequacy in the Division's handling of the investigation. As able private counsel admits in his affidavit of services, "the fact patten herein was concededly simpler than many of those matters which I otherwise undertake and handle." Indeed, no claim is made in that affidavit for time expended by private counsel in making *any* investigation.

At the appellate level before the Human Rights Appeal Board and the state courts, the majority finds that a Division attorney, "if one appears," acts as an "advocate of the decision rendered" by the Division or the Appeal Board "which may have denied the employee's claim or granted less relief than the complainant sought." Majority opinion at 8. But the Division attorney in this case *did* appear at all these stages and the Division *did* award the complainant all the relief sought.[3] The nebulous distinction made between representation of the complaint and representation of the complainant[4] is non-existent here since the interests

[3] The initial complaint sought relief not only against the Gaslight Club but its manager and assistant manager as well. Since the assistant manager did recommend Carey for the position of cocktail waitress, the Division found no violation of law on his part. However, complainant did not appeal that determination and makes no claim now that relief should be granted as to him.

[4] Whether the language of section 297(4)(a) actually supports this dichotomy between the Division's prosecution of the complaint and a private counsel's presentation on behalf of the complainant seems at least open to some question. For example, the section states: "With the consent of the division the case in support of the complainant may be presented *solely* by his attorney." This sentence can be read to imply that absent such consent the statute anticipates joint representation on the complainant's behalf by the Division as well as private counsel. I do not believe it necessary, however, to quibble with the construction of the statute suggested by the Division and accepted by the majority.

of the Division and of Carey remained identical throughout the state proceedings once the finding of probable cause was made.[5] The New York State Human Rights Appeal Board was a respondent in the New York State court proceedings and since its findings and determination coincided precisely with those sought by the complainant, no need for private counsel has been demonstrated.[6]

The majority also argues that the denial of awards of attorney's fees in state proceedings may encourage needless federal litigation under Title VII. This claim is not persuasive. The majority decision is the first ever to sanction as award by a federal court for attorney's fees earned in a state action. It obviously can only promote litigation in the federal courts, where district judges are already inundated with calendars of increasing weight and complexity.[7]

[5] The continuing solicitude of the Division for the complainant is demonstrated by its filing of an *amicus* brief in this court for the purpose of explaining the pertinent New York law. While this agency, like other state and federal agencies, may well be undermanned, the appropriate remedy for such a problem is state legislative action rather than an unprecedented decision which permits private representation to be determined by the federal courts even absent a showing of need for such representation in a particular case.

[6] The majority argues in footnote 9 that the absence of a Division attorney at the initial hearing establishes the need for the retention of private counsel. However, it was that voluntary retention that created the absence which is now relied upon to establish inadequate state representation. See note 2, *supra*. The amicus brief here points out that a Division attorney does appear at the hearing "if the complainant has not retained private counsel; if the complainant has retained private counsel the Division attorney appears at the Division's option to protect the public interest."

[7] The *amicus* brief submitted by the Division states that in 1977 it was forced to reassess and restructure the allocation of Division attorneys. This step was necessary because of severe case backlogs

Dissenting Opinion of Circuit Judge William H. Mulligan

To require these district courts to fix counsel fees in state actions when the burden of representation has been shared by counsel provided by the state at no cost to the complainant is particularly onerous.[8]

The position of the majority is ostensibly bolstered by two considerations which are not convincing. First, we are told that if a party knew he could recover attorney's fees once he got to a federal proceeding but could recover none if he prevailed at the state administrative level, there would be a precipitate rush to the federal forum. However, the Civil Rights Law of 1964, as we have seen, mandates recourse to the state agency. 42 U.S.C. § 2000e-5(c). The fact that state law has no provision for awarding fees for private counsel in such an action is no ground for circumventing the statutory deferral to the state agency before pursuing a federal remedy. Appellant here has in fact argued at length in her brief that attempts to gain premature access to the federal courts have not been looked upon with favor. In analogous situations where the state action has not yet been resolved the district court has

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resulting from a doubling and redoubling of the Division caseload since 1970. In view of the majority's holding it cannot be gainsaid that a large percentage of these proliferating state actions will now be followed by suits initiated in federal district courts simply to recover attorney's fees unobtainable in the state proceeding.

[8] The majority claims to find support for its position in cases such as *Fischer* v. *Adams*, 572 F.2d 406 (1st Cir. 1978), *Parker* v. *Califano*, 561 F.2d 340 (D.C. Cir. 1977) and *Foster* v. *Boorstin*, 561 F.2d 340 (D.C. Cir. 1977). See majority opinion at 6-7. But in those cases, as even the majority acknowledges, a federal court was reviewing federal agency action and adjudicating alleged violations of federal law. Moreover, unlike the State of New York, the federal agency did not ensure the assistance of counsel to complainants in proceedings before it. Therefore, the majority's reliance on these cases is misplaced.

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placed the Title VII complaint on the suspended calendar pending resolution of the state proceedings. See *Schudtz* v. *Dean Witter & Co., Inc.*, 418 F. Supp. 14, 18-19 (S.D.N.Y. 1976). Cf. *Rios* v. *Enterprise Association Steamfitters Local No. 638*, 326 F. Supp. 198, 203-04 (S.D.N.Y. 1971).

The majority suggests, however, that a complainant might be reluctant to present a case fully before a state agency "for fear that success at that level would deprive her of an attorney's fee award." This tactic, observes the majority, would deprive the federal courts of the benefit of a complete record when reviewing the case. I submit that this is not realistic. The person who is the victim of job discrimination because of race or color and is concerned enough to file a complaint with a state agency is not likely to jeopardize the vindication of basic civil rights by failing to present a complete case at that level. Moreover, the complainant in New York is represented, as we have indicated, by state counsel who are fully experienced in the field. If further private counsel is retained it would obviously be unprofessional and unethical to provide less than full service at the administrative level because success at that level might foreclose an award of fees by a federal court. Attorneys who have specialized in the civil rights field are zealous and dedicated. Their performance will not be affected by this decision one way or the other.

For these reasons I would affirm the dismissal of the complaint.

Memorandum Decision of Henry F. Werker, *D.J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 4794 (HFW)

No. 47641

MS. CIDNI CAREY,

Plaintiff,

—against—

NEW YORK GASLIGHT CLUB, INC., *et al.*,

Defendants.

APPEARANCES (See last page):

HENRY F. WERKER, *D.J.*

The plaintiff in this employment discrimination action brought pursuant to the Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, was awarded back pay and an offer of a position as a cocktail waitress in defendants' club after prevailing in a state administrative proceeding and upon appellate review by the state courts. The complaint was initially filed with the federal Equal Opportunity Employment Commission (EEOC) but that agency referred the matter to the New York State Division of Human Rights (Division) pursuant to 42 U.S.C. § 2000e-5(c). The plaintiff now moves for an award of attorneys' fees in this suit which was commenced before the remedies provided for under state law had been exhausted.[1] Since all of the relief

[1] The state procedures are set forth in the New York Human Rights Law which is found in Article 1 of the New York Executive Law, § 290 *et seq.* (McKinney 1972-1977 Supp.). Briefly a party claiming to be aggrieved by a discriminatory employment practice may file a verified complaint with the Division. *Id.* § 297(1). After a preliminary investigation the Division determines whether it has jurisdiction to hear the matter and if so whether there is probable cause to believe that an unlawful practice has existed or continues to exist. *Id.* § 297(2). Assuming that it finds probable cause the Division may direct the respondent or respondents to answer the charges at a public hearing before a hearing examiner. *Id.* § 297(4)(a). At such a hearing the complainant's case is presented by an attorney for the Division or at the complainant's option by privately retained counsel. *Id.* Adverse determinations may be appealed to the New York State Human Rights Appeal Board (Appeal Board), *id.* § 297-a, and thereafter to the Appellate Division of the New York State Supreme Court and possibly the New York Court of Appeals. *Id.* § 298.

Making use of the state administrative remedies generally precludes a complainant from bringing an employment discrimination suit in state court. *Id.* § 297(9).

requested by the plaintiff with the exception of attorneys' fees was awarded in the state forum the issue presented is whether the plaintiff is entitled to those fees simply because a parallel federal court action was filed after the EEOC impliedly reassumed jurisdiction over the matter and issued a "right to sue letter."

BACKGROUND

The relevant facts are not involved. At the request of the Division the plaintiff filed a verified complaint in February of 1975. The Division thereafter determined that it had jurisdiction over the matter and that probable cause existed to believe that the Human Rights Law had been violated. In May of 1975 plaintiff's counsel wrote to the EEOC and asked that it "reassume jurisdiction . . . so that . . . [the plaintiff could] obtain a Right to Sue letter *at an appropriate time in the future.*" (Emphasis added.) The Division subsequently held a hearing on the matter and issued a decision and order on August 13, 1976. Between

that date and August 26, 1977 when the Appeal Board affirmed the decision below plaintiff's counsel had a series of telephone conversations with and sent certain documents to the EEOC District Office. These communications took place over a period from May 22, 1975 to on or about November 13, 1976 and prompted the District Office to notify the plaintiff by letter that EEOC had decided not to litigate her case. The District Office letter was received by the plaintiff on July 13, 1977 and contained a right to sue letter. The plaintiff therefore filed the instant action within ninety days as is required by 42 U.S.C. § 2000e-5(f)(1). On November 3, 1977 the Appellate Division, First Department, unanimously affirmed the administrative determinations and on February 14, 1978 the New York Court of Appeals denied the defendants leave to appeal.

DISCUSSION

Although plaintiff's counsel merely asked the EEOC to reassume jurisdiction as a preparatory measure, the District Office of the EEOC went beyond that narrow request and issued a right to sue letter while the state proceedings were still pending. The appropriateness of that action is in my view very doubtful; particularly so when the EEOC had an alternative of awaiting the conclusion of the state administrative and judicial proceedings.

By acting as it did the EEOC placed the plaintiff in a position where she had no option but to preserve her rights by filing a complaint in federal court. However, while it appears that the pendency of related employment discrimination actions in both state and federal courts is now a sanctioned practice, *see Voutis* v. *Union Carbide Corp.*, 452 F.2d 889, 893-94 (2d Cir. 1971), *cert. denied*, 406 U.S. 918 (1972), it by no means follows that the mere filing of a

federal suit should serve to entitle an aggrieved party to attorneys' fees. And under the circumstances of this case I conclude that it does not.

The plaintiff had the option of pursuing her state administrative remedies without incurring any expense at all for legal services since section 297 of the New York Human Rights Law provides that the "case in support of the complaint shall be presented by one of the attorneys or agents of the [D]ivision." Rather than availing herself of such free representation the plaintiff chose to be represented by privately retained counsel. However, because neither she nor her attorneys could have foreseen that there would be a need to file a separate federal court action it is clear that they could not have expected that the defendants would ever be required to shoulder the costs of representing her in the state forum. Consequently I see no reason why they should now be given a windfall simply because the EEOC acted precipitously. In this connection I note that any other solution might lead to use of the federal courts as a procedural conduit through which otherwise unwarranted relief could be obtained. This would lead to massive waste of judicial and administrative resources and is clearly a result to be avoided.

Parker v. *Califano*, 561 F.2d 320 (D.C. Cir. 1977), which is cited by the plaintiff is in my opinion inapposite. That case involved a claim of discrimination by an employee of a federal agency. There is an administrative and judicial enforcement mechanism for such claims pursuant to section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, but unlike the provisions governing suits against private employers those controlling suits by federal employees do not provide for the complainant to be represented by attorneys or agents employed by the government.

Memorandum Decision of Henry F. Werker, D.J.

Therefore the complainant in *Parker* (unlike the plaintiff in this action) had no alternative but to retain counsel. In such circumstances I agree that an award of attorneys' fees is appropriate; under the facts of this case I do not.

The application for fees is consequently denied.

So Ordered.

Dated: New York, New York
September 15, 1978

/s/ Henry F. Werker
U.S.D.J.

Complaint—United States District Court for the Southern District of New York

In the

UNITED STATES DISTRICT COURT

For the Southern District of New York

77 Civ. 4794

Ms. Cidni Carey,

Plaintiff,

vs

New York Gaslight Club, Inc. and John Anderson, Manager of the New York Gaslight Club, Inc.,

Defendants.

Introduction

1. This is a proceeding for relief against the racially discriminatory policies and practices being carried on by the Defendants herein named which resulted in the arbitrary and racially discriminatory refusal by the Defendants to hire the Plaintiff for an evening cocktail waitress position in the New York Gaslight Club, Inc. The Plaintiff seeks redress for the violation of her constitutional, civil and statutory rights.

Jurisdiction

2. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1331 and 1343 in conjunction with the Civil Rights Act of 1866 (42 U.S.C. Section 1981) and the Thirteenth Amendment to the United States Constitution.

In addition, jurisdiction is invoked in conjunction with Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. Section 2000 (e) *et seq.*), the Plaintiff having received a Notice of Right to Sue Letter from the Equal Employment Opportunity Commission on July 13, 1977 and having filed this Complaint, per said letter, within 90 days thereafter. Jurisdiction is also invoked in conjunction with 28 U.S.C. Sections 2201 and 2202 this action seeking declaratory as well as injunctive and monetary relief.

PARTIES

3. Cidni Carey, the Plaintiff, is a Black female citizen of the United States who resides in the City of New York, County of Queens, State of New York.

4. The New York Gaslight Club, Inc. is located at 124 East 56th Street, New York, New York. It has operated since approximately 1956 and provides restaurant services in a night club type atmosphere to a private key club membership. The New York Gaslight Club, Inc. is a subsidiary corporation of a Delaware Corporation and is one of several such subsidiary corporations.

5. John Anderson is presently manager of the New York Gaslight Club, Inc. and was, at the time that the Plaintiff sought employment with said Club, manager thereof.

ALLEGATIONS

6. On or about August 26, 1974 Plaintiff went to the Gaslight Club for the purposes of applying for a position as an evening waitress, the Plaintiff having called said Club and been advised that positions were available and to

come to said Club and ask for Mr. Anderson when she arrived thereat.

7. When the Plaintiff first called and spoke with the New York Gaslight Club she was asked if she could sing and dance and Plaintiff replied in the affirmative.

8. The Plaintiff previously was employed as a Playboy Club bunny where she was required to sing and dance, among other of her duties. In addition, the Plaintiff has been employed as an actress on two television soap operas.

9. The Plaintiff did go to the New York Gaslight Club as it was requested of her.

10. Upon her arrival at the Club she was advised by Mr. Anderson to go upstairs where she would be interviewed with respect to her singing ability. Thereupon, the Plaintiff did proceed upstairs where she engaged with the piano player in the rendition of the same song about three times. Mr. Ray Angelic, a former opera singer, who initially interviewed an applicant for appearance and singing and dancing ability, listened to the Plaintiff and was satisfied with both her appearance and her singing ability. He took down pertinent information and inquired of her whether she had ever held similar type work theretofore (the Plaintiff indicating, in response, that she had been employed by the Playboy Club).

11. On the same date a white person was hired as a cigarette salesperson although said individual had been interviewed for a waitress position. Furthermore, said white individual had been advised of the existence of the cigarette salesperson position whereas the Plaintiff had not been so advised.

12. Notwithstanding that the Plaintiff sought a waitress position, she was never called relative to the same although several such positions became available after she interviewed including a couple almost immediately thereafter and although said employees of the New York Gaslight Club, Inc. were supposedly under directives from management to affirmatively seek out and hire Black persons as waitresses.

13. During the almost twenty one years of its existence, it is believed that the New York Gaslight Club, Inc. has employed only perhaps four Black persons as waitresses (out of the perhaps thousands of persons employed during that period in that position), one of whom was employed after the Plaintiff filed a Complaint with the New York State Division of Human Rights in 1975, challenging the refusal by the New York Gaslight Club, Inc. to hire the Plaintiff in August, 1974 or thereafter notwithstanding the existence of waitress positions.

14. As of February, 1976, the Gaslight Club, Inc. employed only approximately five Black employees out of a total employee force of approximately eighty persons; and said Black employees included several musicians and several persons in the kitchen. Save for perhaps two waiters, the New York Gaslight Club, Inc. has virtually no Black employees in visible positions. The New York Gaslight Club, Inc. has no Black employees in management positions or on its Board of Directors.

15. In February, 1975, the Plaintiff filed a Complaint with the New York State Division of Human Rights challenging the New York Gaslight Club's refusal to hire her. Those proceedings continue to date with the New York

Gaslight Club, Inc. now seeking review of the Division Order, as affirmed by the New York State Human Rights Appeal Board, which Order found that the New York Gaslight Club, Inc. had violated the Human Rights Law of the State of New York. Said review is now being sought pursuant to a special proceeding in the Supreme Court, Appellate Division—First Department.

16. The plaintiff, by background and otherwise, is a highly competent person to be employed as a waitress at the Gaslight Club, Inc. in New York. As previously noted, the Assistant Manager of the New York Gaslight Club, Inc., Mr. Ray Angelic, himself, found the Plaintiff's singing ability and appearance satisfactory for employment with and by the New York Gaslight Club, Inc.

17. It is not believed that Mr. John Anderson, then the Manager of the New York Gaslight Club, Inc. and the person responsible for hiring individuals, interviewed the Plaintiff.

18. The refusal of the New York Gaslight Club, Inc. to employ the Plaintiff as a waitress was arbitrary, capricious and racially discriminatory and violative of the Plaintiff's rights as guaranteed by the Thirteenth Amendment to the United States Constitution and the Civil Rights Acts of 1871 and 1964, as amended (42 U.S.C. Section 1981 and 42 U.S.C. Section 2000 (e) *et seq.*).

WHEREFORE, Plaintiff respectfully prays that this Court assume jurisdiction of this cause, set the matter down for hearing, and:

Complaint—United States District Court for the Southern District of New York

1. Declare the actions, inaction, policies and practices of the Defendants, as challenged herein, to be arbitrary, capricious and racially discriminatory.

2. Declare the refusal of the Defendants to hire the Plaintiff as arbitrary, capricious, and racially discriminatory and violative of her rights as guaranteed by the Thirteenth Amendment to the United States Constitution and the Civil Rights Acts of 1871 and 1964, as amended (42 U.S.C. Section 1981 and 42 U.S.C. Section 2000 (e) *et seq.*).

3. Require the Defendants to hire the Plaintiff to a position in said Club with all benefits attendant thereto, including the accrual of all monetary and other benefits which she would have obtained if she had been hired in August, 1974 when she applied for a position.

4. Award the Plaintiff back pay with interest.

5. Award the Plaintiff costs and attorneys fees.

6. Award the Plaintiff such other and further relief as the Court deems just and reasonable.

Respectfully submitted,

NATHANIEL R. JONES, ESQ.
GEORGE E. HAIRSTON, ESQ.
JAMES I. MEYERSON, ESQ.
N.A.A.C.P.—1790 Broadway
New York, New York 10019
(212) 245-2100
Attorneys for Plaintiff

By: JAMES I. MEYERSON

Order of Henry F. Werker, *D.J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 4794 (HFW)

MS. CIDNI CAREY,

Plaintiff,

—v—

NEW YORK GASLIGHT CLUB, INC., *et al.*,

Defendants.

ORDER

HENRY F. WERKER, *D.J.*

The New York State Division of Human Rights having directed that the defendant club offer plaintiff a position as a waitress and having made an award of back pay, and

All possible appeals from that decision having been exhausted after the filing of this action,

It is hereby ORDERED that the complaint in the instant action be dismissed and the case forthwith marked off the calendar.

So ORDERED.

July 27, 1978

/s/ HENRY F. WERKER,
U.S.D.J.

FILED
U. S. DISTRICT COURT
S.D. OF N.Y.
JUL 27 1978

Affidavit of James I. Meyerson in Support of Application for Attorneys Fees

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

77 Civ. 4794

MS. CIDNI CAREY,

Plaintiff,

VS

NEW YORK GASLIGHT CLUB, INC., *et al.*,

Defendants.

AFFIDAVIT IN SUPPORT OF APPLICATION
FOR ATTORNEYS FEES

JUDGE HENRY WERKER
STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

James I. Meyerson, being first duly sworn, deposes and says:

1. I am one of the attorneys for the Plaintiff herein; and I execute this Affidavit in that capacity.

2. I have the sole responsibility for the preparation and prosecution of this federal litigation, including the application now pending before this Court.

3. Previously I was almost entirely responsible (although not exclusively responsible) for the preparation

and prosecution of the administrative proceedings in the New York State Division of Human Rights (as a consequence of the deferral thereto by the New York District Office of the Equal Employment Opportunity Commission after the Plaintiff herein initially filed a complaint with said Commission charging the Defendant New York Gaslight Club, Inc. with racially discriminatory conduct).

4. In addition, I was exclusively responsible for the representation of the Plaintiff herein in administrative and judicial proceedings subsequent to the proceeding before the New York State Division of Human Rights (including the proceedings before the New York State Human Rights Appeal Board, an entity separate and apart from and independent of the New York State Division of Human Rights, and proceedings before the New York State Supreme Court/Appellate Division—First Judicial Department and the New York State Court of Appeals).

5. As a consequence of my efforts in this proceeding and in the proceedings convened prior to the institution of this federal action but in connection therewith (as a consequence of the interrelatedness by and between state proceedings and federal Title VII enforcement effort—per the federal statutory scheme), I undertook the following: After consultation with the Plaintiff, preparation and filing of Complaint with the New York District Office of the Equal Employment Opportunity Commission; Preparation and presentation of evidence before the New York State Division of Human Rights (subsequent to the filing of a complaint therein by the Plaintiff as a consequence of the federal referral and deferral thereto); Preparation and

submission of Post Hearing Brief (Memorandum) to the Hearing Examiner (Norman Mednick) in the New York State Division of Human Rights; Preparation and submission of papers in opposition to the Defendants Motion to the New York State Human Rights Appeal Board for a stay pending the outcome of their appeal to said Board from the decision of the New York State Division of Human Rights (which was favorable to Plaintiff); Preparation and submission of Brief to the New York State Human Rights Appeal Board; Preparation and submission of papers and Brief to the New York State Supreme Court/ Appellate Division—First Judicial Department in response to appeal thereto by the Defendants from the decision in both the New York State Division of Human Rights and the New York State Human Rights Appeal Board (which decisions were adverse to said Defendants); Preparation and submission of papers in opposition to Motion of the Defendants to the New York State Supreme Court/Appellate Division—First Judicial Department for Reargument from the unanimous decision of that Court which affirmed the administrative decisions or in the alternative for Leave to File an Appeal with the New York State Court of Appeals in this matter (which Motion was ultimately denied); Preparation and submission of papers in opposition to the Motion to the New York State Court of Appeals by the Defendants requesting said Court to assume jurisdiction of an appeal from the foregoing decision and orders of the Appellate Division (which Motion before the Court of Appeals was denied); Preparation and submission of Complaint to this Court (pursuant to the Notice of Right to Sue Letter received by the Plaintiff from the Equal Employ-

ment Opportunity Commission); Preparation of papers to this Court in connection with the pending issue (regarding attorneys' fees), including the submission of a memorandum (and preparation thereof) and the preparation and submission of affidavits (including the one herein) attendant thereto.

6. In connection with the foregoing, I spent the following hours relative thereto:

a. Consultation and drafting of Complaint to the Equal Employment Opportunity Commission (5 hours).

b. Preparation and presentation of evidence before the New York State Division of Human Rights (7 hours).

c. Preparation and submission of Post Hearing Brief to the New York State Division of Human Rights (15 hours).

d. Preparation and submission of papers in opposition to application by the Defendants for a stay pending appeal to the New York State Human Rights Appeal Board (5 hours).

e. Preparation and submission of Brief to the New York State Human Rights Appeal Board (8 hours).

f. Preparation and submission of Brief to New York State Supreme Court/Appellate Division—First Judicial Department (8 hours).

g. Preparation and submission of papers in opposition to Motion of Defendants to Appellate Division

for Reargument or otherwise for leave to appeal to the New York State Court of Appeals (3 hours).

h. Preparation and submission of Brief to New York State Court of Appeals in Opposition to Motion of Defendants for Leave to Appeal thereto (from the adverse decision(s) of the Appellate Division—First Judicial Department) (5 hours).

i. Preparation and submission of Complaint to the United States District Court for the Southern District of New York (4 hours).

j. Preparation of Memorandum in support of Application for Attorneys' Fees and Affidavits attendant thereto (22 hours).

7. The total amount of time spent in this matter, as set forth above, is eighty two (82) hours. Included in said time was research, writing, communication with counsel for the Defendants, my client, and counsel for the New York State Division of Human Rights. All of the aforementioned takes into account the various efforts attendant to research and presentation, including examination of information received and documents prepared by counsel for the Defendants and counsel for the New York State Division of Human Rights.

8. In addition to the foregoing, Plaintiff's counsel has spent substantial numbers of hours in attempting to work out the implementation of the decretal order issued by the New York State Division of Human Rights, something which has not, to this date, been completed (at least relative to the resolution of the backpay award, still unpaid). I

have not set forth any of the hours attributable to the efforts in this respect.

9. I am seeking the sum of one hundred dollars per hour ($100.00 per hour) for my efforts herein.

10. I believe that, in view of my experience, the nature of the case herein, and the favorable resolution of the matter to the Plaintiff, the sum of one hundred dollars ($100.00) per hour is not unreasonable.

11. I graduated from Syracuse University College of Law in 1969 with a J.D. Degree. Prior to that I secured a B.A. Degree from the University of Pittsburgh (graduating therefrom in June, 1966).

12. Upon completion of my law studies, I took the bar examination for admittance to practice before the courts of the State of New York, in the summer of 1969; and I passed said examination.

13. I enlisted in VISA in September, 1969, and became associated with the Charlotte-Mecklenburg Legal Aid Society in North Carolina for the next approximately thirteen months.

14. In October, 1970, I became associated with the Office of the General Counsel of the National Association of the Advancement of Colored People as Assistant General Counsel; and I continue to be associated therewith and hold the same position to date.

15. During the seven and one half years which I have been associated with the afore-mentioned office I have been

involved in approximately ninety civil rights efforts, most of which involved some court dynamic (although not exclusively) and a great many of which I was involved in (court-wise) in one form or another.

16. I have been involved in approximately thirty (30) efforts wherein I have been primarily, if not sometimes exclusively, responsible for the preparation and prosecution of the entire case (including pre-trial discovery, the trial and the post trial effort, including all aspects of the appellate level work). These cases have been largely federal court cases although it does include some state court work (including the trial and appellate level) and some federal and state administrative work (wherein both conciliation and adjudicatory efforts were undertaken).

17. Included among the cases in which I have been primarily, if not solely, responsible are the following: *State* v. *Rogers,* where, with two other attorneys, I defended a young Black individual who had been accused of rape. Said trial took place in Fort Smith, Arkansas. Said youth was convicted and sentenced to life without parole. State appellate process pursued, unsuccessfully (with dissent); and a federal habeas corpus (in which I am solely responsible) is now pending in the Eastern District of Arkansas (*Rogers* v. *Britton*); *Russ* v. *Ratliff,* wherein I was primarily responsible for preparation and prosecution of wrongful death case (shooting death of Black man by white Star City, Arkansas policeman) in federal court before twelve-person jury. Verdict was rendered against us and, upon appeal (solely prepared and prosecuted by me), the United States Court of Appeals for the Eighth Circuit reversed the jury

verdict and set it aside, finding and holding that, if the civil rights acts are to have any meaning, the verdict could not stand. We are presently back before the Eighth Circuit regarding, responsibility, if any, of the City of Star City, Arkansas once damages are assessed; ar a related matter, I was primarily responsible for the preparation and prosecution of the civil action encaptioned *The N.A.A.C.P., etc., et al.* v. *Bell, etc., et al.,* a decision of which was just rendered by the United States District Court for the District of Columbia, the Honorable Barrington Parker, presiding, wherein I was awarded attorney's fees of approximately $25,000.00 (twenty-five thousand dollars) based on the rate of $100.00 (one hundred dollars) per hour. A copy of said decision is attached hereto and made part hereof. Said Court took note of my reputation in the area of civil rights as principal attorney in that matter; *Hart* v. *Community School Board,* is the first New York City school desegregation matter decided by a federal court. I was solely responsible for the preparation and prosecution of the trial as well as all of the appellate aspects thereof (of which there were several aspects). A finding of liability rendered by the District Court was affirmed by the Second Circuit with the so-called "Hart standard" becoming a national standard of which there has been much written by academicians and the Court since it was enunciated; at present there is pending before the United States District Court for the Eastern District of New York, the Honorable John F. Dooling, Jr., presiding, the case of *The Parent Association of Andrew Jackson High School* v. *Ambach,* still another New York City school desegregation matter in which I was solely responsible for the preparation and prosecution thereof; *Patterson* v. *City of Syracuse,* a matter which I

was almost exclusively responsible for preparing and prosecuting in the New York State Division of Human Rights and which is believed to contain one of the largest records of a matter adjudicated therein (in excess of four thousand pages). We were partially successful and proceedings attendant thereto followed (in both the administrative appeal level and in the various New York State appellate courts); *Herring* v. *City of Syracuse* is a wrongful death matter which I tried along with George E. Hairston, Esq., one of the co-counsel for the Plaintiff herein. Said matter was tried before a jury of six persons in Syracuse, New York (the Supreme Court/Onondaga County) and a non-unanimous verdict was rendered. Matter is now on appeal before the Appellate Division/Fourth Judicial Department; in this Court and before your Honor, I did prepare and prosecute the matter of *Jackson* v. *New York City Health and Hospitals Corporation*, a case wherein we sought a preliminary injunction to foreclose the City from closing Morrisania Hospital. This Court denied said relief (after a hearing) and dismissed said action; in *Snead* v. *Department of Social Services*, this Court, by Judge Weinfeld sitting and writing for a three-judge panel, held Section 72 of the New York Civil Service Law unconstitutional. Said decision was ultimately vacated by the United States Supreme Court *on other gounds.*

18. The foregoing represent a sampling of the many, many cases in which I have been involved and continue to be involved.

19. Based on the foregoing and the attached decision, I do believe that the fee which I am requesting herein

is reasonable and justified, recognizing that any Human Rights case/civil rights case/civil liberties case is inherently difficult notwithstanding that some are of course more difficult than others and that the fact pattern herein was concededly simpler than many of those matters which I otherwise undertake and handle.

20. As noted the foregoing is not an exhaustive list, by any stretch, of the matters in which I have been involved singularly or in conjunction with others.

21. I have argued matters in the United States Courts of Appeal for the Second Circuit, Fifth Circuit, Sixth Circuit, Eighth Circuit, Tenth Circuit and the Court of Appeals for the District of Columbia. I have tried cases and otherwise been involved in proceedings before the United States District Courts for the District of Columbia, the Northern District of Florida, the Southern District of Ohio, the Eastern District of Arkansas, the Southern District of Mississippi, the Eastern District of Oklahoma, the Northern District of New York, the Western District of New York, the Eastern District of New York and the Southern District of New York.

22. I believe myself to be a reasonably experienced civil rights litigator and appellate advocate; and I believe that said reasonable experience is manifested by the foregoing discussion.

WHEREFORE and in view of the foregoing, I respectfully request that I be awarded the sum of $8200.00 (eighty-two hundred dollars) as reasonable attorney's fee for efforts in this matter (consistent with the Memorandum of Law which

Affidavit of James I. Meyerson in Support of Application for Attorneys Fees

permits such an award and encourages the same in view of the policy purpose of Title VII of the Civil Rights Act of 1964).

Respectfully submitted,

/s/ James I. Meyerson, Esq.
James I. Meyerson, Esq.

(Sworn to by James I. Meyerson, Esq. on April 17, 1978.)

Supplemental Affidavit of James I. Meyerson

In the
UNITED STATES DISTRICT COURT
For the Southern District of New York
77 Civ. 4794

Ms. Cidni Carey,
Plaintiff,
vs
New York Gaslight Club, Inc., *et al.,*
Defendants.

Supplemental Affidavit

Judge Henry Werker
State of New York,
County of New York, *ss.:*

James I. Meyerson, being first duly sworn, deposes and says:

1. I am one of the attorneys for the Plaintiff herein; and I execute this Affidavit in that capacity.

2. I have been primarily (almost solely) responsible for all of the representation of the Plaintiff herein and through the state administrative and judicial proceedings which have transpired heretofore.

3. In my initial Affidavit herein, submitted contemporaneously with Plaintiff's Memorandum in Support of her

Application for Attorneys' Fees herein, I mis-spoke in Paragraph #32 (as well as in the Memorandum wherein I reiterate said error).

4. I noted in Paragraph #32 that Plaintiff never requested that the Equal Employment Opportunity Commission reassume jurisdiction over this matter, pursuant to Title VII provisions and subsequent to the initial deferral by said Commission after the Plaintiff had initially filed her complaint against the Defendants with said Commission.

5. However, in reviewing my letter to Mr. Frank Patterson, Supervisor/Case Control, New York District Office of the Equal Employment Opportunity Commission, dated May 20, 1975, a copy of which is attached to my initial Affidavit and a copy of which is attached hereto, it is obvious that I did request that the Equal Employment Opportunity Commission reassume jurisdiction over the complaint, it being more than sixty (60) days since the matter was deferred to the New York State Division of Human Rights by said Commission.

6. Said letter makes it known that the Plaintiff was seeking for the Commission to assume (reassume) jurisdiction should it be necessary for the Plaintiff to secure a Notice of Right to Sue Letter.

7. Referring to my letter of June 2, 1975 to the Plaintiff, a copy of which is attached to my first Affidavit and a copy of which is attached hereto, we did believe that the Commission, per our request, did implicitly, if not ex-

plicitly, advise us in its letter to me, dated May 22, 1975 (a copy of which is attached to my initial Affidavit and a copy of which is attached hereto), that it had reassumed jurisdiction over Plaintiff's matter.

8. As I advised the Plaintiff, it was my understanding (and still remains my understanding) that the Equal Employment Opportunity Commission has a tremendous case load making it likely that an investigation of the complaint by said Commission would not and will not be undertaken for approximately one year (if not more) from the time that said Commission reassumes jurisdiction.

9. It is apparent that the Plaintiff herein viewed her efforts in the New York State Division of Human Rights as a very integral part of her federal Title VII effort.

10. Certainly, once the Plaintiff secured a favorable verdict by and through the State Division of Human Rights as a consequence of the deferral action, the Plaintiff did view said proceedings as the primary mechanism for resolving the controversy which had been initiated by the filing of the complaint with the Equal Employment Opportunity Commission (without the need for Commission efforts or federal court litigation).

11. It was through the deferral and the ultimate resolution in the New York State Division of Human Rights that the Plaintiff secured relief relative to her Title VII complaint.

12. As a matter of fact, the congressional statutory scheme envisioned just such a dynamic (thus the reason

for including in that federal statutory scheme deferral reference to state proceedings).

13. It is obvious that the Equal Employment Opportunity Commission did not begin its efforts in this matter until on or about November, 1976, well over one year after it assumed (reassumed) jurisdiction herein; and that, when it did the same, it learned that the Plaintiff had been successful in the New York State Division of Human Rights, as a consequence of the deferral, and that, accordingly, there was really nothing at that point in time to do since the matter had, in effect, been resolved.

14. It should be noted that the matter in the State Division of Human Rights was not resolved, voluntarily, through conciliation efforts; but rather was resolved through an administrative adjudicatory process whereat hearings were held, evidence produced, and briefs ultimately submitted. At the conclusion of said administrative trial, the New York State Division of Human Rights did issue a Decision and Order in favor of the Plaintiff.

It is submitted, then, that the efforts in the New York State Division of Human Rights, by which this federal Title VII matter was, in effect, resolved, were and are intricately a part of the "proceedings" envisioned with the federal statutory Title VII scheme.

WHEREFORE, Plaintiff respectfully requests that she be awarded appropriate attorneys' fees for her efforts under-

taken in the New York State Division of Human Rights and in other proceedings related thereto.

Respectfully submitted,

.....

JAMES I. MEYERSON, ESQ.
N.A.A.C.P.—1790 Broadway
New York, New York 10019
(212) 245-2100
Attorney for Plaintiff

By: /s/ JAMES I. MEYERSON

(Sworn to by James I. Meyerson on April 15, 1978.)

Motion Seeking Modification of Memorandum Decision and Order and Seeking Leave to Supplement the Record Herein (Rule 52) and Affidavit Annexed Thereto

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

77 Civ. 4794

MS. CIDNI CAREY,

Plaintiff,

vs

NEW YORK GASLIGHT CLUB, INC., *et al.*,

Defendants.

Now comes the Plaintiff herein, by and through her attorneys, and respectfully moves this Court to modify its Memorandum Decision Order, handed down on September 15, 1978 and entered with the Clerk on September 21, 1978 (a copy of which is attached hereto). In addition, the Plaintiff seeks leave of this Court to supplement the record herein upon which the Application for Attorneys' Fees is premised. Said Motion is brought pursuant to Rule 52 of the Federal Rules of Civil Procedure.

Respectfully submitted,

NATHANIEL R. JONES, Esq.
JAMES I. MEYERSON, Esq.
1790 Broadway—10th Floor
New York, New York 10019
(212) 245-2100
Attorneys for Plaintiff (Moving Party)

/s/ JAMES I. MEYERSON

Motion Seeking Modification of Memorandum Decision and Order and Seeking Leave to Supplement the Record Herein (Rule 52) and Affidavit Annexed Thereto

AFFIDAVIT OF JAMES I. MEYERSON

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

JAMES I. MEYERSON, Esq., one of the attorneys for the Plaintiff herein (Moving Party), being first duly sworn, deposes and says:

1. I am one of the attorneys for the Plaintiff herein; and I execute this Affidavit in that capacity. I am fully with all of the proceedings which have transpired to date in this matter (administratively and otherwise) as I have had the primary (and sometime sole) responsibility for the preparation and prosecution of all aspects of this matter on behalf of Ms. Carey, the Plaintiff herein and the Complainant in the proceedings before the New York State Division of Human Rights.

2. By its decision and order, dated September 15, 1978 and entered with the Clerk of the Court on September 21, 1978, this Court denied to the Plaintiff's attorneys attorneys' fees for their successful preparation and prosecution of the proceeding before the New York State Division of Human Rights.

3. At page three of said decision, this Court wrote:

"The plaintiff had the option of pursuing her state administrative remedies without incurring any expenses at all for legal services since section 297 of the New York Human Rights Law provides that the 'case in support of the complaint shall be presented by one of

the attorneys or agents of the Division.' Rather than availing herself of such free representation the plaintiff chose to be represented by privately retained counsel."

4. Plaintiff's counsel received formal notification of the entry of the Memorandum Decision and Order, from which the above quote is excerpted, on September 27, 1978. A copy of said notification is attached hereto and made part hereof (having thereon the date notation on which the document was received in the office of Plaintiff's counsel). On September 28, 1978, Plaintiff's counsel did obtain a copy of the Memorandum Decision in the Office of the Opinion Clerk, United States District Court, Southern District of New York.

5. Upon reading the same and particularly the above excerpted quote, the Plaintiff's counsel did call the New York State Division of Human Rights, Office of the General Counsel, and did speak with one attorney therein with whom he had previously associated in Division proceedings.

6. It has always been my position that the Division attorney, when ostensibly representing the complainant in a Division proceeding, is, in reality and in theory, representing the Commissioner of the New York State Divison of Human Rights, upon the complaint, and not the complainant himself/herself.

7. Thus in a proceeding where the complainant does not prevail (by Commissioner's decision and order) and is represented by the Division attorney (ostensibly), the Divi-

sion attorney cannot appeal the adverse decision, upon the complaint and for the complainant, because such would be be inconsistent with the finding of the Commissioner whom the Division attorney, in reality and in theory, represents.

8. Moreover, where the complainant secures only partial relief, upon prevailing, and seeks further relief in an appeal, the Division attorney will not represent the complainant in said effort since to do so would be inconsistent with the position of the Commissioner, whom said attorney represents upon the complaint of the charging party.

9. Furthermore, where a party prevails before the Commissioner and an appeal is prosecuted by the non-prevailing party to the Appeal Board and the decision is reversed by the Appeal Board (against the complainant and the Commissioner), nevertheless it is believed that the Division attorney (who would appear before the Appeal Board to justify the decision of the Commissioner, upon the complaint of the charging party) would not and cannot appeal the decision of the Appeal Board to the Courts of the State of New York.

10. All of the aforementioned was confirmed to me by an attorney in the Office of the General Counsel of the New York State Division of Human Rights (per my telephone conversation with her on Thursday, September 28, 1978).

11. It is apparent, therefore, that the Division attorney does not represent the complainant (charging party) but rather the Commissioner, upon the complaint of the charging party.

Motion Seeking Modification of Memorandum Decision and Order and Seeking Leave to Supplement the Record Herein (Rule 52) and Affidavit Annexed Thereto

12. It is apparent, as well, in the instant case, the Division attorney represented the Commissioner and not the Complainant.

13. Thus it is submitted that it is error to hold, as this Court did, that the Plaintiff herein had the option of obtaining a Division attorney where, it is apparent, that the attorney represents the Commissioner, upon a complaint and not the complainant, and where, it is apparent, that conflict in that representation effectively denies to the complainant effective representation.

14. It was error, as well, for the Court to hold that the Plaintiff herein went out and retained private counsel. The Complainant did not have funds to secure a private attorney and did not pay any monies to the attorneys, employed by the N.A.A.C.P. Special Contribution Fund, Inc., who did, in fact, represent the Plaintiff (more specifically, James I. Meyerson, Esq.).

15. James I. Meyerson, Esq., as employed by the N.A.A.C.P., undertook to represent Ms. Carey in the public interest and as a private attorney general seeking to enforce the federal laws and policies against employment discrimination (as set forth more fully in Title VII of the Civil Rights Act of 1964, as amended—42 U.S.C. Section 2000(e) *et seq.*).

16. To the extent that the proceedings eventually took place in the New York State Division of Human Rights, they did so as a consequence of federal deferral under the federal law and rules governing Title VII complaints.

Motion Seeking Modification of Memorandum Decision and Order and Seeking Leave to Supplement the Record Herein (Rule 52) and Affidavit Annexed Thereto

17. Thus, if the Plaintiff herein had not secured the public interest attorneys employed by the N.A.A.C.P. (and had not been able to obtain other public interest attorneys), she would not have had, in fact, a full and complete representation in the Division proceedings (to the extent that the Division attorneys represent the Commissioner rather than the complainant—upon the complaint of the charging party).

In view of the foregoing, Plaintiff herein submits that this Court should modify its findings and otherwise amend its conclusion and award Plaintiff's counsel attorneys' fees upon the application heretofore submitted. In addition, Plaintiff requests leave to supplement the record herein with further evidence corroborating the statements herein made (statements made in light of the apparent misunderstanding by the Court of the responsibility and representative capacity of the State Division attorney in a State Division proceeding).

Respectfully submitted,

JAMES I. MEYERSON, Esq.
N.A.A.C.P.—1790 Broadway
New York, New York 10019
(212) 245-2100
Attorney for Plaintiff

/s/ JAMES I. MEYERSON

(Sworn to by James I. Meyerson on September 29, 1978.)

Affidavit of Adele Graham

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MS. CIDNI CAREY,

Plaintiff,

—against—

NEW YORK GASLIGHT CLUB, INC., *et al.*,

Defendants.

AFFIDAVIT

ADELE GRAHAM, being duly sworn, deposes and says:

1. I am an attorney on the staff of ANN THACHER ANDERSON, General Counsel of the State Division of Human Rights, and am assigned to the position of Supervisor of the Administrative Hearing Section. As such, I am fully familiar with the practices of the State Division of Human Rights, particularly with respect to the presentation of cases at public hearings, for which I bear the primary responsibility, as well as on appeals thereof. I make this affidavit at the request of JAMES I. MEYERSON, Esq., attorney for the plaintiff in the above-entitled action. I have read Mr. Meyerson's motion and the defendant's memorandum submitted in opposition.

2. The hearing caseload of the Division of Human Rights has more than doubled in the last three years, and doubled as well in the previous three or four years, while the staff of attorneys available to handle the cases has

been approximately halved. As a result, it became necessary drastically to revise the Division's procedures with respect to the presentation of such cases at public hearing.

3. One of the major methods utilized was the elimination of the prior practice of assigning a Division attorney to every case. Complainants were encouraged to obtain private counsel and, in the overwhelming majority of such cases, the Division attorneys' participation in the presentation of the cases at public hearing routinely was reduced to administrative duties and occasional consultation about procedures. This practice was subsequently codified in a major revision of the Division's Rules of Practice 9 NYCRR § 465, promulgated October 18, 1977. See § 465.11, ***Representation by an attorney.***

4. The Division's records reveal that such practice was followed in the public hearing of *Carey* v. *New York Gaslight Club, Inc.* The Division attorney did not appear at all during the extensive two day trial at which the complete record was made; the entire burden of placing evidence into the record, and arguing the significance thereof, was borne by the attorney for the plaintiff.

5. Even before the practice of assigning a Division attorney to each hearing case changed, as aforestated, the Division made a distinction with respect to its obligations under § 297.4(a) of the Human Rights Law. This distinction was based upon the two disjunctive sentences therein: "The case in support of the *complaint* shall be presented by one of the attorneys or agents of the Division and, at the option of the complainant, by his attorney. With the consent of the Division, the case in support of the *com-*

plainant may be presented solely by his attorney." (Emphasis supplied.) The Division interpreted this statutory language as requiring a distinction between the *complaint* which the Division was required to further, and the *complainant*, whose private interests might or might not be identical with the public interests represented by the Division. There is not infrequently some substantial difference between the public interest the Division has in the complaint, and the private interests of the complainant. In presenting a case at public hearing, or in settling a public hearing case, the Division attorney is instructed that his/her primary responsibility is the protection of the public interest.

6. The quoted language of § 297.4(a) as to the obligations of the Division attorney to the complaint refers only to the public hearing aspect of a case. The entire Section § 297.4(a) spells out the procedures for public hearings, only. The Defendants' memorandum, at page 3, obviously misreads the statute on this point. Appeals to the State Human Rights Appeal Board and to the appropriate State courts are covered procedurally by §§ 297-a and 298. No specific reference is contained in those sections as to the Division's obligations to argue appeals.

7. The Division is however authorized to obtain enforcement of its order or of the order of the State Human Rights Appeal Board, by the terms of § 298, and has historically read into that obligation the implicit power to argue for affirmance of its orders on a respondent's appeal thereof. This power is exercised on behalf of the Division, seeking to uphold its order, and not on behalf of the complainant.

8. The Division's actions before the Board and the Courts in upholding its Order may readily be seen as distinct from the situation obtaining when the complainant is dissatisfied with an Order after Hearing. The Division, through counsel, does not participate in such an appeal on behalf of the complainant, who must pursue an appeal either *pro se* or through private counsel. The Division's legal staff must support the Commissioner's Order After Hearing, even though such support is inimical to the interests of the complainant.

9. Illustrative of the lack of identity of interest between the Division and the complainant may be seen in several recent matters where the Order After Hearing upheld the complaint, but full relief was not awarded to the complainants. The complainants were then required to take appeals in order to obtain such full relief, but without the legal assistance of the Division.

10. In another recent case, the State Human Rights Appeal Board reversed an Order After Hearing favorable to a complainant. The Division was unable lawfully to provide legal counsel since it is bound, by the terms of § 297-a of the Human Rights Law, to the decisions of the board. The complainant had to secure private counsel to prosecute a successful appeal of that reversal to the Appellate Division, Fourth Department.

/s/ ADELE GRAHAM
Adele Graham

(Sworn to by Adele Graham on October 18, 1978.)

Complaint—New York State Division of Human Rights

STATE OF NEW YORK

EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS

on the complaint of

CIDNI CAREY,

Complainant,

—against—

GASLIGHT CLUB; RAY ANGELIC, Manager
& JOHN ANDERSON, Manager,

Respondent.

I, Ms. Cidni Carey residing at 61-25 98th Street, Rego Park, N.Y. 11374 Tel. No. ..... charge Gaslight Club whose address is 124 E. 56th St., NYC Tel. No. PL 2-2500 with an unlawful discriminatory practice relating to employment on or about August 26, 1974 by refusing to hire me because of my AGE ( ), RACE (xx), CREED ( ), COLOR (xx), NATIONAL ORIGIN ( ), SEX ( ).

The particulars are:

1. On Monday, August 26, 1974, I went to the Gaslight Club to apply for a job as a waitress. Prior to appearing at the Gaslight Club, I called to make sure that positions were open, at that time I was asked to come to the Club for an interview.

2. I was interviewed by Mr. Ray Angelic and Mr. John Anderson, Managers of the Club. They are both

White. They told me I had all the qualifications for the job, but I was not hired.

3. On information and belief, the Gaslight Club has no Black waitresses. A White waitress was given the job for which I had applied.

4. I am Black. Based on the foregoing, I charge the Gaslight Club; Ray Angelic and John Anderson, Managers, with discriminating against me by refusing to hire me because of my race and color, in violation of the Human Rights Law of the State of New York.

By reason of the unlawful discriminatory practice of respondent as herein alleged, complainant has already suffered damages in the sum of $ unspecified.

I have not commenced any civil, criminal or administrative action or proceeding in any court or administrative agency based upon the same grievance.

/s/ CIDNI CAREY

(Sworn to by Cidni Carey on February 21, 1975.)

Order, Findings and Decision of New York State Division of Human Rights

STATE OF NEW YORK

EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS

Case No. (S) CF-36685-75

STATE DIVISION OF HUMAN RIGHTS

on the complaint(s) of

CIDNI CAREY,

Complainant,

—against—

THE NEW YORK GASLIGHT CLUB, INC., RAY ANGELIC, Assistant Manager, and JOHN ANDERSON, Manager,

Respondents.

NOTICE OF ORDER AFTER HEARING

SIRS:

PLEASE TAKE NOTICE that the within is a true copy of an Order issued herein by Werner H. Kramarsky, Commissioner of the State Division of Human Rights, after a hearing held before Hearing Examiner Norman Mednick, Esq. In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at 2 World Trade Center, New York, New York 10047. The Order may be inspected by any member of the public during the regular office hours of the Division.

Order, Findings and Decision of New York State Division of Human Rights

PLEASE TAKE FURTHER NOTICE that in accordance with Section 297-a of the New York State Human Rights Law, any party to the proceeding aggrieved by said Order of the Division may obtain review thereof in a proceeding before the State Human Rights Appeal Board, 2 World Trade Center, 82nd Floor, New York, New York 10047, provided such appeal is commenced by the filing with the Board of a notice of appeal within fifteen (15) days after the service of this Order.

DATED: AUG 13 1976
NEW YORK, NEW YORK

STATE DIVISION OF HUMAN RIGHTS

/S/ WERNER H. KRAMARSKY
Werner H. Kramarsky
Commissioner

To:

Ms. Cidni Carey
61-25—98 Street
Rego Park, New York 11374

The New York Gaslight Club, Inc.
124 East 56 Street
New York, New York 10022

Mr. Ray Angelic
8 Grandview Avenue
Pawling, New York

Mr. John Anderson
525 East 89 Street
New York, New York

Order, Findings and Decision of New York State Division of Human Rights

Kane, Kessler, Proujansky, Preiss & Permutt, P.C.
Albert N. Proujansky, Esq., *of Counsel*
680 Fifth Avenue
New York, New York 10019

James I. Meyerson, Esq.
George Hairston, Esq., *of Counsel*
NAACP Special Contribution Fund
1790 Broadway
New York, New York 10019

Bevery Gross, Esq., *General Counsel*
Terry Myers, Esq., *of Counsel*
State Division of Human Rights
2 World Trade Center
New York, New York 10047

Hon. Louis J. Lefkowitz
Attorney General
2 World Trade Center
New York, New York 10047

Order, Findings and Decision of New York State Division of Human Rights

STATE OF NEW YORK

EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS

Case No. (S) CF-36685-75

STATE DIVISION OF HUMAN RIGHTS

on the complaint(s) of

CIDNI CAREY,

Complainant,

—against—

THE NEW YORK GASLIGHT CLUB, INC., RAY ANGELIC, Assistant Manager, and JOHN ANDERSON, Manager,

Respondents.

PROCEEDINGS IN THE CASE

On the 21st day of February, 1975, the above-named Complainant filed a complaint, thereafter amended, with the State Division of Human Rights (hereinafter the "Division"), charging the above-named Respondents with an unlawful discriminatory practice relating to employment, in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondents had engaged in an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

Order, Findings and Decision of New York State Division of Human Rights

After due notice, the case came on for hearing before Norman Mednick, Esq., a Hearing Examiner of the Division. The hearing was held on September 22, 1975, and on January 15, 1976.

Complainant was represented by George Hairston, Esq., and Jame I. Meyerson, Esq. Respondents were represented by Kane, Kessler, Proujansky, Preiss & Permutt, P.C., by Albert N. Proujansky, Esq., of Counsel. The Division was represented by Terry Myers, Esq.

FINDINGS OF FACT

1. Complainant, Cindi Carey, is Black.

2. At all times herein pertinent, Respondent, The New York Gaslight Club, Inc., is a club commonly known as the Gaslight Club (hereinafter Respondent "Club"), and located at 124 East 56 Street, New York, New York.

3. At all times herein pertinent, Respondent Ray Angelic was employed by the Respondent Club as Assistant Manager.

4. At all times herein pertinent, Respondent John Anderson was employed by the Respondent Club as Manager.

5. On or about August 26, 1974, Complainant visited the Respondent Club and applied for a job as an evening cocktail waitress.

6. Evening cocktail waitresses in the employ of the Respondent Club are required to sing and dance.

Order, Findings and Decision of New York State Division of Human Rights

7. Complainant met Respondent Anderson who asked that she sing for Respondent Angelic; Complainant was not asked to dance.

8. At no time thereafter did the Respondent Club offer the Complainant a job as an evening cocktail waitress.

9. From on or about August 27, 1974, to on or about November 21, 1975, the Respondent Club hired at least 11 evening cocktail waitresses, all of whom are Caucasian.

10. Respondent Angelic did not have the authority to hire waitresses; Respondent Anderson had the sole power to hire waitresses.

11. Applicants for evening cocktail waitress positions are not interviewed by Respondent Anderson unless screened and approved by Respondent Angelic.

12. The record shows that Respondent Angelic screened and approved the Complainant and that she was qualified to be an evening cocktail waitress for the Respondent Club.

13. I find that Respondent Anderson did not hire Complainant because of her race and color.

14. The Respondent Club is responsible for the discriminatory acts committed by its agents or employees.

15. There is no evidence in the record that Respondent Angelic discriminated against the Complainant, in violation of the Human Rights Law.

Order, Findings and Decision of New York State Division of Human Rights

16. As a direct result of the unlawful discriminatory act committed against her, Complainant sustained a loss of wages in the amount of $52.00 per week, computed on the basis of the average weekly earnings of four evening cocktail waitresses during the period October of 1974 through September of 1975.

DECISION

Based upon the foregoing, I find that Respondents, The New York Gaslight Club, Inc. and John Anderson discriminated against Complainant because of her race and color, in violation of the Human Rights Law.

I further find that the awarding of compensatory damages to the aggrieved Complainant will effectuate the purposes of the Human Rights Law.

I further find that Respondent Angelic did not discriminate against Complainant, in violation of the Human Rights Law.

ORDER

Upon the basis of the foregoing Findings of Fact and pursuant to the Human Rights Law, it is hereby

ORDERED, that the complaint against Respondent Ray Angelic be and the same hereby is dismissed, and it is further

ORDERED, that the Respondents The New York Gaslight Club, Inc. and John Anderson, their agents, employees, successors and assigns shall cease and desist from discriminating against any employee or individual in the terms, conditions and privileges of employment because of the race and color of such individual, and it is further

ORDERED, that said Respondent The New York Gaslight Club, Inc. and John Anderson, their agents, employees,

Order, Findings and Decision of New York State Division of Human Rights

successors and assigns shall take the following affirmative action which will effectuate the purposes of the Human Rights Law:

1. Respondents shall, within ten (10) days from the effective date of this Order offer, in writing, to employ the complainant in the position of evening cocktail waitress. Complainant shall have five (5) business days in which to accept or reject the said offer. If Complainant accepts, Respondent The New York Gaslight Club, Inc., shall grant to Complainant all the rights, benefits, privileges and seniority to which she would have been entitled had she been employed as an evening cocktail waitress from August 27, 1974.

2. Respondent, The New York Gaslight Club, Inc., shall within ten (10) days from the effective date of this Order, pay to Complainant as backpay, the sum of $52 per week from August 27, 1974 to the date she accepts or rejects the offer set forth in paragraph 1, above, less any sums earned by Complainant during the said period and hours she would have worked for Respondent, and less the standard payroll deductions. Said payment shall bear interest at the rate of six percent (6%) per annum and the interest shall be computed from a reasonable intermediate date, in accordance with Section 5001 (b) of the CPLR. Said intermediate date shall be the date computed by taking the middle date from August 27, 1974 to the date that the Complainant accepts or rejects the Respondent's offer. Respondent shall furnish proof of payment within ten (10) days thereof to the State Division of Humar Rights, Attention Beverly Gross, Esq., General Counsel, 2 World Trade Center, New York, New York 10047.

3. Respondents shall send a memorandum to all their supervisory employees, agents and officers, and to all recognized unions or other organizations representing their employees, instructing them that they have a policy of nondiscrimination because of race and color in the treatment of employees, as well as in employment and work assignments, and that such employees, agents and/or representatives are required to implement the said policy.

4. Respondents shall make available to the duly-authorized representative of this Division such documents and information as may be necessary for the Division to ascertain whether there is compliance with this Order.

Dated: August 13, 1978
New York, New York

STATE DIVISION OF HUMAN RIGHTS

WERNER H. KRAMARSKI, *Commissioner*

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-192

NEW YORK GASLIGHT CLUB, INC., and JOHN ANDERSON,
Manager of the New York Gaslight Club, Inc.,

Petitioners,

vs.

MS. CIDNI CAREY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED AUGUST 6, 1979
CERTIORARI GRANTED OCTOBER 9, 1979

INDEX

Relevant Docket Entries

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NEW YORK GASLIGHT CLUB, INC., and JOHN ANDERSON, Manager of the New York Gaslight Club, Inc.,

Petitioners,

against

MS. CIDNI CAREY,

Respondent.

Date	*Proceedings*
November 29, 1978	—Filed copies of docket entries and notice of appeal (Carey).
March 9, 1979	—Case argued before: Smith, Mansfield, Mulligan, CJJ.
May 8, 1979	—Judgment reversing and remanding in signed published opinion, Smith, CJ filed. Dissenting in separate published opinion, Mulligan, CJ.
May 8, 1979	—Judgment filed.
May 29, 1979	—Mandate issued (opinion, judgment and statement of costs).
August 10, 1979	—Notice of filing of petition for writ of certiorari filed.

Relevant Docket Entries

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Date	*Proceedings*
September 30, 1977	—Filed complaint—issued summons.
November 10, 1977	—Filed defendant NY Gaslight Club, Inc. ANSWER
April 14, 1978	—Filed plaintiff's affidavit re discrimination.
April 14, 1978	—Filed plaintiff's memo in support of award for attorneys' fees.
April 18, 1978	—Filed affidavit of James I. Meyerson in support of application for attorney's fees.
April 18, 1978	—Filed affidavit by James I. Meyerson, attorney for plaintiff, supplemental affidavit re attorney's fees.
May 4, 1978	—Filed plaintiff's reply memorandum in opposition to defendant's assertions, re attorney's fees.
July 27, 1978	—Filed ORDER that the complaint in the instant action is dismissed and the case forthwith off the calendar—Werker, J.
September 20, 1978	—Filed defendant's memorandum in opposition to the application of counsel for the plaintiff herein for an award of attorney's fees for services rendered to the plaintiff in certain proceedings had under the NY State Human Rights Laws.

Relevant Docket Entries

Date	*Proceedings*
September 21, 1978	—Filed Memorandum Decision #47641 & Order. Plaintiff moves for an award of attorney's fees. Since all of the relief requested by plaintiff with the exception of attorney's fees, for the reasons stated, the application for fees is consequently denied. So Ordered, WERKER, J.
October 4, 1978	—Filed plaintiff's affidavit and notice of motion to modify its memorandum decision and order of September 21, 1978 and seeks leave to supplement the attorney's fees pursuant to Rule 52 ret. on submission.
October 25, 1978	—Filed affidavit from State Div. of Human Rights re request of plaintiffs.
November 3, 1978	—Filed Memo-End. on motion dated October 4, 1978. Plaintiff moves for modification of the Court's decision ent. September 21, 1978 and for leave to supplement the record, etc. For the reasons stated the motion is denied in all respects. So Ordered, WERKER, J.
November 28, 1978	—Filed plaintiff's notice of appeal to the USCA re Opinion and Order filed September 15, 1978 and plaintiff's notice of motion for reconsideration ent. November 3, 1978, dismissing the complaint and denying plaintiff's attorney's fees. Copy sent to: Albert Proujansky, Esq. of Kane, Kessler, Proujansky, Preiss & Permutt, 680 Fifth Ave., New York, N.Y. 10019.
December 27, 1978	—Filed notice that original record on appeal has been certified and transmitted to the USCA.
June 1, 1979	—Filed True Copy of Mandate and Opinion docketed as a Judgment #79,0625 on June 4, 1979, by the Clerk, that the order of the District Court is reversed and the action is remanded for further proceedings with costs to be taxed against the appellees.

Majority Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 743—August Term, 1978.

(Argued March 9, 1979 Decided May 8, 1979.)

Docket No. 78-6703

MS. CIDNI CAREY,

Plaintiff-Appellant,

v.

NEW YORK GASLIGHT CLUB, INC., and JOHN ANDERSON,
Manager of the New York Gaslight Club, Inc.,

Defendants-Appellees.

Before:

SMITH, MANSFIELD and MULLIGAN,

Circuit Judges.

Appeal from denial of attorney's fees under § 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), in the Southern District of New York, Henry F. Werker, *Judge*. Opinion reported at 458 F. Supp. 79 (1978). Reversed and remanded.

JAMES I. MEYERSON (N.A.A.C.P., New York, N.Y., Nathaniel R. Jones and George E. Hairston, of counsel), *for Appellant.*

Majority Opinion of United States Court of Appeals for the Second Circuit

ADELE GRAHAM (Ann Thacher Anderson, General Counsel, State Division of Human Rights, State of New York, of counsel), *for Amicus Curiae.*

MARVIN LUBOFF (Kane, Kessler, Proujansky, Preiss & Nurnberg, P.C., New York, N.Y., Albert N. Proujansky, of counsel), *for Appellees.*

SMITH, *Circuit Judge:*

This is an appeal from dismissal by the United States District Court for the Southern District of New York, Henry F. Werker, *Judge,* of an action for attorney's fees under 42 U.S.C. § 2000e-5(k). We find error and reverse and remand for allowance of attorney's fees.

This is a case of first impression involving the right of a successful party to collect attorney's fees under Title VII of the Civil Rights Act of 1964, U.S.C. § 2000e *et seq.*, for proceedings at the state administrative level. Based on the statutory scheme of Title VII, the legislative history and public policy, we reverse the denial below of an attorney's fee award, and hold that such a successful party is entitled to counsel fees under Title VII.

Facts

Appellant Cidni Carey applied for a position as a waitress with appellee New York Gaslight Club, Inc. in 1974. She was not offered a job. Believing that she was denied a position because of her race, Carey filed a complaint with the New York office of the Equal Employment Opportunity Commission ("EEOC").

Majority Opinion of United States Court of Appeals for the Second Circuit

Carey's complaint was referred to the New York State Division of Human Rights by the EEOC, in accordance with the statutory scheme of deferring to state mechanisms for resolving discrimination charges under Title VII. 42 U.S.C. § 2000e-5(c). Carey then filed a formal complaint with the state Division of Human Rights, at that agency's request. The state agency made a finding of jurisdiction and probable cause that unlawful discrimination had taken place. After conciliation efforts had failed, Carey's case was recommended for a public hearing. A hearing was held, concluding in January, 1976.

In August, 1976 the Division of Human Rights issued an order finding that the Gaslight Club had unlawfully discriminated against Carey on the basis of her race. The Division also directed the Club to offer Carey a waitress position and to award her back pay. The Gaslight Club appealed this order to the New York State Human Rights Appeal Board, which affirmed the finding of discrimination and order for relief. This decision was also affirmed by the Appellate Division of the New York Supreme Court. 59 App. Div.2d 852, 399 N.Y.S.2d 158 (1st Dept. 1977). The New York Court of Appeals subsequently denied leave to appeal in February, 1978. 43 N.Y.2d 648, 403 N.Y.S.2d 1026 (1978).

The EEOC was not directly involved in any of the state proceedings dealing with Carey's complaint. Carey's counsel[1] communicated with the EEOC to inform that

[1] We note in passing that Appellant Carey was represented in the state proceedings and in federal court by attorneys on the staff of the National Association for the Advancement of Colored People ("N.A.A.C.P."). The fact that counsel in this case worked with a public interest organization rather than a private firm of course does not affect the application of § 706(k) of Title VII, 42

office of the course of the state proceedings. In July, 1977 Carey received a Notice of Right to Sue Letter from the EEOC. Within the statutorily required 90-day period,[2] Carey filed a suit in federal district court.

In the district court, the only issue presented by Carey was the award of attorney's fees based on her success at the state administrative level, following referral to the state agency by the EEOC. Judge Werker denied the request for attorney's fees, holding that Carey could have been represented by a state-provided attorney if she had wished, and that the filing of a federal court suit while the state administrative claim was still pending did not warrant an award of attorney's fees. For the reasons below, we reverse and remand for consideration of an award of counsel fees.

Discussion

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e *et seq.* The statute sets forth a detailed scheme of enforcement by the Equal Employment Opportunity Commission. 42 U.S.C. § 2000e-5.[3] Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), provides that

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U.S.C. § 2000e-5(k), since attorney's fees under that section are awarded to public interest lawyers in the same manner as to private attorneys. *Reynolds* v. *Coomey*, 567 F.2d 1166, 1167 (1st Cir. 1978); *Rios* v. *Enterprise Association Steamfitters Local 638 of U.A.*, 400 F. Supp. 993, 996 (S.D.N.Y. 1975), *aff'd* 542 F.2d 579 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977).

[2] 42 U.S.C. § 2000e-5(f)(1). *See* note 3, *infra*.

[3] Pursuant to 42 U.S.C. § 2000e-5(c)-(d), a person who wishes to allege discrimination in violation of Title VII must file a

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs. . . .

The purpose of this provision for counsel fees is to facilitate the bringing of individual complaints in order to "effectuate the congressional policy against . . . discrimination." *Johnson* v. *Georgia Highway Express*, 488 F.2d 714, 716 (5th Cir. 1974). *See also, Christianburg Garment Co.* v. *Equal Employment Opportunity Commission*, 434 U.S. 412, 418 (1978). Such a statute which provides for attorney's fees awards in civil rights cases is aimed at enforcing congressional mandates against discrimination through private actions and should be read "broadly to achieve its remedial purpose." *Mid-Hudson Legal Services, Inc.* v. *G & U, Inc.*, 578 F.2d 34, 37 (2d Cir. 1978).[4]

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complaint with his or her state or local equal opportunity agency, if such an agency empowered to "grant or seek relief" exists, before the Equal Employment Opportunity Commission may act on it. The state agency then has 60 days in which to process the complaint, after which time the complainant may file a charge with the EEOC. The EEOC then attempts to conciliate the discrimination charge, and may itself bring action against the alleged violator. If the EEOC does not conciliate or take action against the employer, the Commission issues a "Notice of Right to Sue" letter to the complainant, who may then file an action in district court within 90 days. 42 U.S.C. § 2000e-5(f).

[4] Though *Mid-Hudson Legal Services* involved the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, rather than Title VII, there are useful comparisons to be drawn between the two attorney's fees provisions. According to the Senate Report on the Civil Rights Attorney's Fees Awards Act, the language of that act "follows the language of Titles II and VII of the Civil Rights Act of 1964," 1976 U.S. Code Cong. & Ad. News 5910, and "[i]t is intended that the standards for awarding fees [in that

Though § 706(k) on its surface provides for awards of counsel fees at the court's discretion, the policy developed by the Supreme Court favors awards of fees to successful plaintiffs unless there are special circumstances which would render such an award unjust. *See Christianburg Garment Co., supra,* 434 U.S. at 416-17. This approach stems from a recognition that it is in the public interest to aid Title VII enforcement through private actions, and a liberal reading of the attorney's fees provision encourages this effort. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 415 (1975), *citing Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968) (per curiam), *and Northcross* v. *Memphis Board of Education,* 412 U.S. 427 (1973) (per curiam). *Accord Rios* v. *Enterprise Association Steamfitters Local 638 of U.A.,* 400 F. Supp. 993, 995 (S.D.N.Y. 1975), *aff'd* 542 F.2d 579 (2d Cir. 1976), *cert. denied,* 430 U.S. 911 (1977).

The issue in this case, then, is whether the general policy of awarding attorney's fees to successful plaintiffs in Title VII actions envisions an award to a party who is successful in pursuing her claim before the state human rights agency without having to pursue her case in federal court. There is no real question that Carey prevailed on the merits before the Division of Human Rights.[5] The question is whether § 706(k) encompasses fee awards to complaining parties who succeed at a step in the statutory scheme before they are forced to litigate their claims in federal court.

Deference to state mechanisms for resolving discrimination complaints is an integral part of the enforcement

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Act] be generally the same as under the fee provisions of the 1964 Civil Rights Act." *Id.,* at 5912.

[5] *See Foster* v. *Boorstin,* 561 F.2d 340, 342-43 (D.C. Cir. 1977).

process under Title VII, 42 U.S.C. § 2000e-5(c), and submission to state remedies is a jurisdictional prerequisite to EEOC action. *See Equal Employment Opportunity Commission* v. *Union Bank,* 408 F.2d 867, 869 (9th Cir. 1968). The statutory framework of Title VII embodies a "federal mandate of accomodation to state action." *Voutsis* v. *Union Carbide Corp.,* 452 F.2d 889, 892 (2d Cir. 1971), *cert. denied,* 406 U.S. 918 (1972). Thus, there can be concurrent jurisdiction over a complaint by the EEOC and the state agency, *Voutsis, supra,* 452 F.2d at 892. In addition, oral referral to a state agency of a complaint filed with the EEOC acts to place the complaint in "suspended animation" until the state has terminated proceedings and "fully complie[s] with the intent" of Title VII. *Love* v. *Pullman Co.,* 404 U.S. 522, 525-6 (1972).

As explained in *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 44 (1974), the enforcement procedures in Title VII were designed to

> assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin. . . . Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit. (Citations omitted.)

Majority Opinion of United States Court of Appeals for the Second Circuit

Thus, state human rights agencies play an important role in the enforcement process of Title VII, since they afford a chance to resolve a discrimination complaint in accordance with federal policy before such a complaint reaches the federal courts.

The language of § 706(k) refers to attorney's fees awards in "any action or proceeding under this subchapter." The subchapter does include the description of deferral to state agencies by the EEOC, and uses the term "proceeding" to describe the state processes. 42 U.S.C. § 2000e-5(c). In light of this, and in light of the use of both "action" and "proceeding" in § 706(k),[6] the language of the statute is broad enough to encompass awards of counsel fees for work done in connection with administrative proceedings following referral to a state agency by EEOC.[7]

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[6] Statutes should be interpreted whenever possible so as not to render any clause, sentence or word superfluous or redundant. *Rockbridge* v. *Lincoln*, 449 F.2d 567, 571 (9th Cir. 1971).

[7] The legislative history of § 706(k) is not particularly enlightening as to the meaning of "action" or "proceeding." *See* Appendix in *Parker* v. *Califano*, 561 F.2d 320, 333 (D.C. Cir. 1977). It is true, however, that the attorney's fees provision was left untouched during the 1972 amendment process to Title VII. Additionally, the legislative history of the enforcement scheme embodied in § 706 talks favorably of the need for administrative tribunals to resolve discrimination complaints, and refers to state fair employment practice commissions as well as federal agencies in this regard. 1972 U.S. Code Cong. & Ad. News 2145-47.

The legislative history of the 1976 Civil Rights Attorney's Fees Awards Act (see note 4, *supra*) also notes that a prevailing party need not have succeeded in a courtroom-context to obtain compensation for counsel fees:

> [F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. 1976 U.S. Code Cong. & Ad. News 5912.

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Other circuits favor a broad reading of the attorney's fees provisions of Title VII to include compensation for work done in administrative proceedings. *Fischer* v. *Adams*, 572 F.2d 406 (1st Cir. 1978); *Parker* v. *Califano*, 561 F.2d 320 (D.C. Cir. 1977); *Foster* v. *Boorstin*, 561 F.2d 340 (D.C. Cir. 1977). *Accord*, *Noble* v. *Claytor*, 448 F. Supp. 1242 (D.D.C. 1978); *Smith* v. *Califano*, 446 F. Supp. 530 (D.D.C. 1978); *McMullen* v. *Warner*, 416 F. Supp. 1163 (D.D.C. 1976). While these cases deal with federal employees involved in federal agency procedures, their reasoning supports a similarly favorable result for complainants who succeed in state administrative proceedings pursuant to Title VII.[8]

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[8] In *Parker* v. *Califano*, 561 F.2d 320 (D.C. Cir. 1977), Judge Wright examines the legislative history and statutory framework of Title VII and concludes that a federal district court has authority to award attorney's fees that include compensation for work done in related administrative proceedings. In discussing the statutory language of § 706(k), which is incorporated into § 717 of Title VII dealing with complaints filed by federal employees, he notes the observation in *Johnson* v. *United States*, D.Md. Civil Action H-74-1343 (June 8, 1976) slip op. at 7, *aff'd* 554 F.2d 632 (4th Cir. 1977):

> Had Congress wished to restrict an award of an attorney's fee to only suits filed in court, there would have been no need to add the words "or proceeding" to "any action." But "proceeding" is a broader term than "action" and would include an administrative as well as judicial proceeding. 561 F.2d at 325.

The court in *Parker* goes on to hold that the general enforcement scheme of Title VII would be "seriously impinge[d]" upon by a narrow interpretation of the attorney's fees provision which would preclude compensation for work done on the administrative level. Such an approach to the award of attorney's fees under Title VII

> clashes sharply with the clearly perceived structure and aims of the Title. From the passage of the Civil Rights Act of 1964, the Title VII enforcement scheme has included both

While the complaint resolution process may be factually different for federal complainants than for private employees, the policy reasons for allowing attorney's fees awards for work done on the administrative level are similar for federal and private employees who claim discrimination in violation of Title VII.

First, the fact that the opposing party in an administrative hearing will most likely be represented by an attorney is as true in the case of an individual filing a charge against a private employer as it is in the case of a federal employee. *See Parker* v. *Califano, supra,* 561 F.2d at 332. In the case of a private employer, the disadvantage at which an individual employee who is not represented by counsel would be placed in a state administrative hearing is potentially every bit as great as that of a federal employee confronting a United States agency.

Judge Werker ruled below that the need to award attorney's fees in the case of private individuals was not as pressing as in the case of federal employees, since a private complainant appearing before the New York Division of Human Rights could have the option of being represented by counsel provided by the Division. In this regard, he cited § 297(4)(a) of the New York Executive Law (Human Rights), McKinney 1972, which provides that the "case in support of the complaint shall be presented by one of the attorneys or agents of the [D]ivision."

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administrative proceedings and judicial actions. 561 F.2d at 331.

Therefore, according to this analysis, the provision for attorney's fees should be read to include both phases of the enforcement process.

We disagree with this conclusion. A brief filed before this court by the New York Division of Human Rights as *amicus curiae* points out that the statute provides for Division lawyers to present the case "in support of the complaint," not in support of the plaintiff. Thus, there may be cases in which the position of the Division lawyer is not the same as that of the complaining party. In addition, as noted by the Division, state attorneys are available to represent complaining parties only at the public hearing stage of the administrative process. In the earlier investigative stage no Division attorney is provided to represent a private employee and in the later appellate stage a Division attorney, if one appears, does so as an advocate of the decision rendered by the New York State Division of Human Rights or of the Appeal Board, which may have denied the employee's claim or granted less relief than the complainant sought.

The need to retain private counsel at the state administrative stage in a Title VII claim is therefore real. If no counsel is present to represent a complainant at the investigative stage, her complaint may never receive a public hearing because there may be no finding of probable cause or jurisdiction. And if a plaintiff cannot obtain representation at the appellate stage, she may be deprived of review of her claim, and may be forced to pursue her case in federal court even where a resolution through state mechanisms might be possible.[9]

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[9] Despite the implications of the dissent, the productive role played by private counsel is apparent in this case. First, as admitted by the dissent, no Division counsel participated in the initial hearing on Carey's case before the New York State Division of Human Rights. It is precisely at this first stage that a case charging discrimination may be won or lost, since it is at this

Second, denial of awards of attorney's fees for administrative proceedings may encourage needless litigation.[10] As noted in *Smith* v. *Califano, supra,* 446 F. Supp. at 534:

> a party who knew he could recover all fees once he got to court but would recover none if he prevailed at the administrative level would rush to court . . . rather than wait for a final agency decision. . . . Thus, the administrative proceeding [required by Title VII] might be relegated to a pro forma exhaustion step decreasing the likelihood that claims could be resolved without resorting to the courts.

Awards of attorney's fees for administrative work furthers the congressional policy of resolving discrimination complaints before they reach the federal courts just as effectively in cases involving state agencies as in those involving federal agencies. Given the compromise worked out by Congress to provide some deference to state dispute resolution mechanisms, *see Voutsis* v. *Union Carbide Corp., supra,* 452 F.2d at 891-92, an interpretation of the attorney's fees provision which favors parties who are successful in state administrative proceedings to the same extent as those who prevail in court is consistent with the legislative intent just as is allowing counsel fees in the context of federal administrative proceedings.

Finally, the importance of providing an incentive for a a complete development of the administrative record is as relevant to state administrative proceedings as to federal ones. *See Smith* v. *Califano, supra,* 446 F. Supp. at 534. If a complaining party is reluctant to present her case fully before a state agency for fear that success at that level would deprive her of an attorney's fee award, the federal courts will not have the benefit of a complete record below when reviewing the case. Thus, courts will have to expend time and energy which might be unnecessary if plaintiffs had an incentive to develop a full administrative record.

The cases cited by appellees for the proposition that attorney's fees under Title VII may be awarded only for success in a courtroom context are not applicable to the case at bar. Neither *Pearson* v. *Western Electric Co.,* 542

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stage that a fact-finder develops findings which will be given great deference at later stages of the litigation. We do not agree with the dissent's suggestion that Carey should have waited to see if the Division attorney could win her case for her before retaining private counsel. If the complainant had lost in the initial hearing stage, she might have been in the position of having the Division attorney represent the *defendants* against whom she brought the complaint in later proceedings, as the prevailing party below. The establishment of a favorable record in the initial stage is crucial, and so plaintiffs should not be penalized for wishing to obtain representation through retained counsel from the beginning of the proceedings.

The record also supports the conclusion that it was Carey's retained counsel, and not the Division attorney, who pressed her case at all levels. In various orders and records of the proceedings, it was noted that retained counsel represented Complainant Carey, while Division attorneys represented "the Division" (Order of Commissioner Kramarsky, August 13, 1976), "the Commissioner's Order" (Order of State Human Rights Appeal Board, August 26, 1977) and "the State Division" (Order of Appellate Division of New York Supreme Court).

Additionally, there is no evidence to contradict the affidavit of retained counsel that he was "almost solely responsible for the prosecution and preparation of the state administrative and judicial proceedings, on behalf of the Plaintiff." Given these facts, we cannot agree with the dissent that the function served by retained counsel was in any way superfluous or unnecessary.

[10] Acts awarding attorney's fees should not be interpreted so as to "encourage plaintiffs to try cases in which reasonable settlement offers have been received, merely to ensure a fee award." *Gagne* v. *Maher,* —— F.2d ——, slip op. at 1603 (2d Cir., March 9, 1979).

F.2d 1150 (10th Cir. 1976), nor *Williams* v. *General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974), deals with a party who prevailed in administrative proceedings undertaken pursuant to the requirements of Title VII. To the extent that the language of those cases limits recovery of attorney's fees under Title VII to parties who succeed in a court, it is inconsistent with the reasoning of the cases we have cited in the area and we decline to adopt that limitation. *See Fischer* v. *Adams, supra* 572 F.2d 406; *Parker* v. *Califano, supra,* and cases cited therein, 561 F.2d at 324 n. 13; *Drew* v. *Liberty Mutual Insurance Co.*, 480 F.2d 69 (5th Cir. 1973), *cert. denied,* 417 U.S. 935 (1974).

A complaining party who is successful in state administrative proceedings after having her complaint under Title VII referred to a state agency in accordance with the statutory scheme of that Title is entitled to recover attorney's fees in the same manner as a party who prevails in federal court. We reverse and remand for further proceedings not inconsistent with this opinion.

Dissenting Opinion of Circuit Judge William H. Mulligan

MULLIGAN, *Circuit Judge,* dissenting:

The majority concedes that its holding is without precedent. The appellant successfully established employment discrimination on the basis of race and color in violation of the New York State Human Rights Law in state agency administrative proceedings where she was provided legal counsel in support of her complaint. She is now permitted to recover attorney's fees for additional legal counsel whom she privately retained for those proceedings. The fee recovery is permitted in a federal action where the only issue presented to the district court is the propriety of an award of such fees.[1] Remarkably, the decision is in part justified by the majority on the ground that it will discourage needless litigation. I respectfully dissent.

Title VII mandated that the initial complaint made by Ms. Carey to the Equal Employment Opportunity Commission (EEOC) be referred to the New York State Division of Human Rights (the Division). 42 U.S.C. § 2000e-5(c). I agree with the majority that the clear congressional purpose underlying that mandatory referral was to utilize existing state and local equal opportunity agencies in order to settle such disputes at the state level before involving the federal courts. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *Love* v. *Pullman Co.*,

[1] The majority speaks of this as an action to recover attorney's fees "at the state administrative level." However, the affidavit of counsel seeks 16 hours ($1600) for appearances in the appellate courts of New York. Of the total of 82 hours expended counsel seeks recompense for some 22 hours for the preparation of memoranda and affidavits in support of the application for attorney's fees.

404 U.S. 522, 526 (1972). In this case the Division investigated the charge of the complainant, made a finding and determination of probable cause and conducted a public hearing. Carey was successful on the merits, winning an award of compensatory damages based on back pay as well as an order directing that she be employed. The employer appealed to the State Human Rights Appeal Board which sustained the order of the agency. The Appellate Division affirmed and the New York Court of Appeals refused leave to appeal as set forth in the majority opinion. We note that the discrimination found by the agency and sustained by the courts of New York was a violation of the New York Human Rights Law. N.Y. Executive Law, Article 15 (McKinney's 1972).

It seems to me to be fundamental that remuneration of private counsel successful in state agency and state judicial proceedings in vindicating rights under state law should be determined by the law of the state which established the substantive right, created the agency, and provided for judicial review. The State of New York has hardly been indifferent to the evil of racial discrimination in employment. Its relevant remedial procedures predated Title VII by nearly 20 years and are derived from legal antecedents enacted as early as 1909. See N.Y. Executive Law (Human Rights Law) § 297, historical note at 305-06 (McKinney's 1972). It is true that the State of New York has made no statutory provision for recovery of private counsel fees in these cases and it is not disputed that no such award is judicially sanctioned in that State. *State Division of Human Rights* v. *Gorton*, 32 A.D. 2d 933, 302 N.Y.S. 2d 966 (2d Dep't 1969). Nevertheless, New York has devised a procedure to satisfy the complainant's need

for counsel in an employment discrimination action. Section 297(4)(a) of the Human Rights Law provides in pertinent part:

> The case in support of the complaint shall be presented by one of the attorneys or agents of the division and, at the option of the complainant, by his attorney. With the consent of the division, the case in support of the complainant may be presented solely by his attorney.

The complainant here was without funds to pay for counsel and retained the services of attorneys employed by the N.A.A.C.P. Special Contribution Fund, Inc. There is nothing in the record before us to indicate any request by these attorneys to present the case solely on behalf of the complainant with the consent of the Division as permitted by the last sentence quoted in section 297(4)(a). The record establishes that the Division assigned an investigator to look into the charges. The Division subsequently found that jurisdiction existed and that there was probable cause to believe that the employer had engaged in an unlawful discriminatory practice in violation of the Human Rights Law. At the ensuing public hearing the complainant was represented by her privately retained attorney and the Division by one of its counsel.[2] On the appeal the complainant was again privately represented and again the Division provided counsel who argued and

[2] The Division attorney admittedly was not active in assisting the presentation of Carey's case at this stage of the proceeding. This occurred, however, because of Carey's voluntary decision to retain independent counsel to handle that presentation. See 9 N.Y.C.R.R. § 465.11.

submitted a brief on Carey's behalf. In all subsequent state legal proceedings this dual representation continued. There is not the slightest hint in the record that at any point the interest of the Division in successful prosecution of the complaint diverged from Carey's interests as complainant. On these facts I believe Judge Werker properly denied an award of counsel fees to the appellant.

I continue to adhere to the view I expressed in *Mid-Hudson Legal Services, Inc.* v. *G. & U. Corp.*, 578 F.2d 34, 37 (2d Cir. 1978), that attorneys who are acting as "private attorneys general" in the civil rights field should receive reasonable compensation for their services. In that case we were construing the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, which explicitly authorizes the district court in its discretion to award reasonable attorney's fees as part of the cost of bringing an action to enforce any of several civil rights statutes. See 578 F.2d at 36 & n.1. The action there was commenced in the federal court and the fees to be awarded involved services performed in a federal tribunal. Here the only federal court procedure involved is the instant action. This suit raises only the issue of counsel fees to be awarded in *state* administrative and judicial proceedings which granted the complainant the full relief requested and which made no provision for compensation for private counsel, presumably because the governing statutory scheme provided state counsel at no expense. Thus, I cannot sensibly characterize these private counsel as private attorneys general whose efforts must be subsidized by defendants in order to encourage plaintiffs injured by racial discrimination to seek legal relief. Compare, e.g., *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-02 (1968).

Title VII does provide that:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . .

42 U.S.C. § 2000e-5(k). The complainant here, however, prevailed not in a Title VII proceeding within the federal remedial framework, but rather in a state agency proceeding which provides agency counsel at no expense to the complainant and makes no provision for the compensation of private counsel. Since Congress insisted in Title VII that existing state agency procedures be utilized and New York had followed its procedure long before enactment of the federal scheme, I cannot find in the language or legislative history of Title VII any intent to permit the federal courts to be utilized in connection with such state proceedings merely as a fee dispensing agency. Such a course only promotes the federal litigation which Congress intended to bypass. Had the Congress intended this unusual result —the awarding by federal courts of attorney's fees not incurred in the federal framework—it could and surely would have explicitly so provided.

The majority argues that the need to retain private counsel at the state level is "real." However, the proper response to that need is a matter for the state legislature to determine, not the federal courts. Moreover, whatever the need for private counsel may be in certain situations, none of the alleged inadequacies in the state approach noted by the majority are present in this case. The majority notes that in the investigative stage no Division attorney is assigned to represent a private employee. However, a Divi-

sion investigator was assigned here and a finding of probable cause was made. There was no suggestion by Carey of any inadequacy in the Division's handling of the investigation. As able private counsel admits in his affidavit of services, "the fact patten herein was concededly simpler than many of those matters which I otherwise undertake and handle." Indeed, no claim is made in that affidavit for time expended by private counsel in making *any* investigation.

At the appellate level before the Human Rights Appeal Board and the state courts, the majority finds that a Division attorney, "if one appears," acts as an "advocate of the decision rendered" by the Division or the Appeal Board "which may have denied the employee's claim or granted less relief than the complainant sought." Majority opinion at 8. But the Division attorney in this case *did* appear at all these stages and the Division *did* award the complainant all the relief sought.[3] The nebulous distinction made between representation of the complaint and representation of the complainant[4] is non-existent here since the interests

[3] The initial complaint sought relief not only against the Gaslight Club but its manager and assistant manager as well. Since the assistant manager did recommend Carey for the position of cocktail waitress, the Division found no violation of law on his part. However, complainant did not appeal that determination and makes no claim now that relief should be granted as to him.

[4] Whether the language of section 297(4)(a) actually supports this dichotomy between the Division's prosecution of the complaint and a private counsel's presentation on behalf of the complainant seems at least open to some question. For example, the section states: "With the consent of the division the case in support of the complainant may be presented *solely* by his attorney." This sentence can be read to imply that absent such consent the statute anticipates joint representation on the complainant's behalf by the Division as well as private counsel. I do not believe it necessary, however, to quibble with the construction of the statute suggested by the Division and accepted by the majority.

of the Division and of Carey remained identical throughout the state proceedings once the finding of probable cause was made.[5] The New York State Human Rights Appeal Board was a respondent in the New York State court proceedings and since its findings and determination coincided precisely with those sought by the complainant, no need for private counsel has been demonstrated.[6]

The majority also argues that the denial of awards of attorney's fees in state proceedings may encourage needless federal litigation under Title VII. This claim is not persuasive. The majority decision is the first ever to sanction as award by a federal court for attorney's fees earned in a state action. It obviously can only promote litigation in the federal courts, where district judges are already inundated with calendars of increasing weight and complexity.[7]

[5] The continuing solicitude of the Division for the complainant is demonstrated by its filing of an *amicus* brief in this court for the purpose of explaining the pertinent New York law. While this agency, like other state and federal agencies, may well be undermanned, the appropriate remedy for such a problem is state legislative action rather than an unprecedented decision which permits private representation to be determined by the federal courts even absent a showing of need for such representation in a particular case.

[6] The majority argues in footnote 9 that the absence of a Division attorney at the initial hearing establishes the need for the retention of private counsel. However, it was that voluntary retention that created the absence which is now relied upon to establish inadequate state representation. See note 2, *supra*. The amicus brief here points out that a Division attorney does appear at the hearing "if the complainant has not retained private counsel; if the complainant has retained private counsel the Division attorney appears at the Division's option to protect the public interest."

[7] The *amicus* brief submitted by the Division states that in 1977 it was forced to reassess and restructure the allocation of Division attorneys. This step was necessary because of severe case backlogs

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To require these district courts to fix counsel fees in state actions when the burden of representation has been shared by counsel provided by the state at no cost to the complainant is particularly onerous.[8]

The position of the majority is ostensibly bolstered by two considerations which are not convincing. First, we are told that if a party knew he could recover attorney's fees once he got to a federal proceeding but could recover none if he prevailed at the state administrative level, there would be a precipitate rush to the federal forum. However, the Civil Rights Law of 1964, as we have seen, mandates recourse to the state agency. 42 U.S.C. § 2000e-5(c). The fact that state law has no provision for awarding fees for private counsel in such an action is no ground for circumventing the statutory deferral to the state agency before pursuing a federal remedy. Appellant here has in fact argued at length in her brief that attempts to gain premature access to the federal courts have not been looked upon with favor. In analogous situations where the state action has not yet been resolved the district court has

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resulting from a doubling and redoubling of the Division caseload since 1970. In view of the majority's holding it cannot be gainsaid that a large percentage of these proliferating state actions will now be followed by suits initiated in federal district courts simply to recover attorney's fees unobtainable in the state proceeding.

[8] The majority claims to find support for its position in cases such as *Fischer* v. *Adams*, 572 F.2d 406 (1st Cir. 1978), *Parker* v. *Califano*, 561 F.2d 340 (D.C. Cir. 1977) and *Foster* v. *Boorstin*, 561 F.2d 340 (D.C. Cir. 1977). See majority opinion at 6-7. But in those cases, as even the majority acknowledges, a federal court was reviewing federal agency action and adjudicating alleged violations of federal law. Moreover, unlike the State of New York, the federal agency did not ensure the assistance of counsel to complainants in proceedings before it. Therefore, the majority's reliance on these cases is misplaced.

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placed the Title VII complaint on the suspended calendar pending resolution of the state proceedings. See *Schudtz* v. *Dean Witter & Co., Inc.*, 418 F. Supp. 14, 18-19 (S.D.N.Y. 1976). Cf. *Rios* v. *Enterprise Association Steamfitters Local No. 638*, 326 F. Supp. 198, 203-04 (S.D.N.Y. 1971).

The majority suggests, however, that a complainant might be reluctant to present a case fully before a state agency "for fear that success at that level would deprive her of an attorney's fee award." This tactic, observes the majority, would deprive the federal courts of the benefit of a complete record when reviewing the case. I submit that this is not realistic. The person who is the victim of job discrimination because of race or color and is concerned enough to file a complaint with a state agency is not likely to jeopardize the vindication of basic civil rights by failing to present a complete case at that level. Moreover, the complainant in New York is represented, as we have indicated, by state counsel who are fully experienced in the field. If further private counsel is retained it would obviously be unprofessional and unethical to provide less than full service at the administrative level because success at that level might foreclose an award of fees by a federal court. Attorneys who have specialized in the civil rights field are zealous and dedicated. Their performance will not be affected by this decision one way or the other.

For these reasons I would affirm the dismissal of the complaint.

Memorandum Decision of Henry F. Werker, *D.J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 4794 (HFW)

No. 47641

MS. CIDNI CAREY,

Plaintiff,

—against—

NEW YORK GASLIGHT CLUB, INC., *et al.*,

Defendants.

APPEARANCES (See last page):

HENRY F. WERKER, *D.J.*

The plaintiff in this employment discrimination action brought pursuant to the Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, was awarded back pay and an offer of a position as a cocktail waitress in defendants' club after prevailing in a state administrative proceeding and upon appellate review by the state courts. The complaint was initially filed with the federal Equal Opportunity Employment Commission (EEOC) but that agency referred the matter to the New York State Division of Human Rights (Division) pursuant to 42 U.S.C. § 2000e-5(c). The plaintiff now moves for an award of attorneys' fees in this suit which was commenced before the remedies provided for under state law had been exhausted.[1] Since all of the relief

[1] The state procedures are set forth in the New York Human Rights Law which is found in Article 1 of the New York Executive Law, § 290 *et seq.* (McKinney 1972-1977 Supp.). Briefly a party claiming to be aggrieved by a discriminatory employment practice may file a verified complaint with the Division. *Id.* § 297(1). After a preliminary investigation the Division determines whether it has jurisdiction to hear the matter and if so whether there is probable cause to believe that an unlawful practice has existed or continues to exist. *Id.* § 297(2). Assuming that it finds probable cause the Division may direct the respondent or respondents to answer the charges at a public hearing before a hearing examiner. *Id.* § 297(4)(a). At such a hearing the complainant's case is presented by an attorney for the Division or at the complainant's option by privately retained counsel. *Id.* Adverse determinations may be appealed to the New York State Human Rights Appeal Board (Appeal Board). *id.* § 297-a, and thereafter to the Appellate Division of the New York State Supreme Court and possibly the New York Court of Appeals. *Id.* § 298.

Making use of the state administrative remedies generally precludes a complainant from bringing an employment discrimination suit in state court. *Id.* § 297(9).

requested by the plaintiff with the exception of attorneys' fees was awarded in the state forum the issue presented is whether the plaintiff is entitled to those fees simply because a parallel federal court action was filed after the EEOC impliedly reassumed jurisdiction over the matter and issued a "right to sue letter."

BACKGROUND

The relevant facts are not involved. At the request of the Division the plaintiff filed a verified complaint in February of 1975. The Division thereafter determined that it had jurisdiction over the matter and that probable cause existed to believe that the Human Rights Law had been violated. In May of 1975 plaintiff's counsel wrote to the EEOC and asked that it "reassume jurisdiction . . . so that . . . [the plaintiff could] obtain a Right to Sue letter *at an appropriate time in the future.*" (Emphasis added.) The Division subsequently held a hearing on the matter and issued a decision and order on August 13, 1976. Between

that date and August 26, 1977 when the Appeal Board affirmed the decision below plaintiff's counsel had a series of telephone conversations with and sent certain documents to the EEOC District Office. These communications took place over a period from May 22, 1975 to on or about November 13, 1976 and prompted the District Office to notify the plaintiff by letter that EEOC had decided not to litigate her case. The District Office letter was received by the plaintiff on July 13, 1977 and contained a right to sue letter. The plaintiff therefore filed the instant action within ninety days as is required by 42 U.S.C. § 2000e-5(f)(1). On November 3, 1977 the Appellate Division, First Department, unanimously affirmed the administrative determinations and on February 14, 1978 the New York Court of Appeals denied the defendants leave to appeal.

DISCUSSION

Although plaintiff's counsel merely asked the EEOC to reassume jurisdiction as a preparatory measure, the District Office of the EEOC went beyond that narrow request and issued a right to sue letter while the state proceedings were still pending. The appropriateness of that action is in my view very doubtful; particularly so when the EEOC had an alternative of awaiting the conclusion of the state administrative and judicial proceedings.

By acting as it did the EEOC placed the plaintiff in a position where she had no option but to preserve her rights by filing a complaint in federal court. However, while it appears that the pendency of related employment discrimination actions in both state and federal courts is now a sanctioned practice, *see Voutis* v. *Union Carbide Corp.*, 452 F.2d 889, 893-94 (2d Cir. 1971), *cert. denied*, 406 U.S. 918 (1972), it by no means follows that the mere filing of a

federal suit should serve to entitle an aggrieved party to attorneys' fees. And under the circumstances of this case I conclude that it does not.

The plaintiff had the option of pursuing her state administrative remedies without incurring any expense at all for legal services since section 297 of the New York Human Rights Law provides that the "case in support of the complaint shall be presented by one of the attorneys or agents of the [D]ivision." Rather than availing herself of such free representation the plaintiff chose to be represented by privately retained counsel. However, because neither she nor her attorneys could have foreseen that there would be a need to file a separate federal court action it is clear that they could not have expected that the defendants would ever be required to shoulder the costs of representing her in the state forum. Consequently I see no reason why they should now be given a windfall simply because the EEOC acted precipitously. In this connection I note that any other solution might lead to use of the federal courts as a procedural conduit through which otherwise unwarranted relief could be obtained. This would lead to massive waste of judicial and administrative resources and is clearly a result to be avoided.

Parker v. *Califano*, 561 F.2d 320 (D.C. Cir. 1977), which is cited by the plaintiff is in my opinion inapposite. That case involved a claim of discrimination by an employee of a federal agency. There is an administrative and judicial enforcement mechanism for such claims pursuant to section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, but unlike the provisions governing suits against private employers those controlling suits by federal employees do not provide for the complainant to be represented by attorneys or agents employed by the government.

Memorandum Decision of Henry F. Werker, D.J.

Therefore the complainant in *Parker* (unlike the plaintiff in this action) had no alternative but to retain counsel. In such circumstances I agree that an award of attorneys' fees is appropriate; under the facts of this case I do not.

The application for fees is consequently denied.

So Ordered.

Dated: New York, New York
September 15, 1978

/s/ Henry F. Werker
U.S.D.J.

Complaint—United States District Court for the Southern District of New York

In the

UNITED STATES DISTRICT COURT

For the Southern District of New York

77 Civ. 4794

Ms. Cidni Carey,

Plaintiff,

vs

New York Gaslight Club, Inc. and John Anderson, Manager of the New York Gaslight Club, Inc.,

Defendants.

Introduction

1. This is a proceeding for relief against the racially discriminatory policies and practices being carried on by the Defendants herein named which resulted in the arbitrary and racially discriminatory refusal by the Defendants to hire the Plaintiff for an evening cocktail waitress position in the New York Gaslight Club, Inc. The Plaintiff seeks redress for the violation of her constitutional, civil and statutory rights.

Jurisdiction

2. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1331 and 1343 in conjunction with the Civil Rights Act of 1866 (42 U.S.C. Section 1981) and the Thirteenth Amendment to the United States Constitution.

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In addition, jurisdiction is invoked in conjunction with Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. Section 2000 (e) *et seq.*), the Plaintiff having received a Notice of Right to Sue Letter from the Equal Employment Opportunity Commission on July 13, 1977 and having filed this Complaint, per said letter, within 90 days thereafter. Jurisdiction is also invoked in conjunction with 28 U.S.C. Sections 2201 and 2202 this action seeking declaratory as well as injunctive and monetary relief.

PARTIES

3. Cidni Carey, the Plaintiff, is a Black female citizen of the United States who resides in the City of New York, County of Queens, State of New York.

4. The New York Gaslight Club, Inc. is located at 124 East 56th Street, New York, New York. It has operated since approximately 1956 and provides restaurant services in a night club type atmosphere to a private key club membership. The New York Gaslight Club, Inc. is a subsidiary corporation of a Delaware Corporation and is one of several such subsidiary corporations.

5. John Anderson is presently manager of the New York Gaslight Club, Inc. and was, at the time that the Plaintiff sought employment with said Club, manager thereof.

ALLEGATIONS

6. On or about August 26, 1974 Plaintiff went to the Gaslight Club for the purposes of applying for a position as an evening waitress, the Plaintiff having called said Club and been advised that positions were available and to

Complaint—United States District Court for the Southern District of New York

come to said Club and ask for Mr. Anderson when she arrived thereat.

7. When the Plaintiff first called and spoke with the New York Gaslight Club she was asked if she could sing and dance and Plaintiff replied in the affirmative.

8. The Plaintiff previously was employed as a Playboy Club bunny where she was required to sing and dance, among other of her duties. In addition, the Plaintiff has been employed as an actress on two television soap operas.

9. The Plaintiff did go to the New York Gaslight Club as it was requested of her.

10. Upon her arrival at the Club she was advised by Mr. Anderson to go upstairs where she would be interviewed with respect to her singing ability. Thereupon, the Plaintiff did proceed upstairs where she engaged with the piano player in the rendition of the same song about three times. Mr. Ray Angelic, a former opera singer, who initially interviewed an applicant for appearance and singing and dancing ability, listened to the Plaintiff and was satisfied with both her appearance and her singing ability. He took down pertinent information and inquired of her whether she had ever held similar type work theretofore (the Plaintiff indicating, in response, that she had been employed by the Playboy Club).

11. On the same date a white person was hired as a cigarette salesperson although said individual had been interviewed for a waitress position. Furthermore, said white individual had been advised of the existence of the cigarette salesperson position whereas the Plaintiff had not been so advised.

12. Notwithstanding that the Plaintiff sought a waitress position, she was never called relative to the same although several such positions became available after she interviewed including a couple almost immediately thereafter and although said employees of the New York Gaslight Club, Inc. were supposedly under directives from management to affirmatively seek out and hire Black persons as waitresses.

13. During the almost twenty one years of its existence, it is believed that the New York Gaslight Club, Inc. has employed only perhaps four Black persons as waitresses (out of the perhaps thousands of persons employed during that period in that position), one of whom was employed after the Plaintiff filed a Complaint with the New York State Division of Human Rights in 1975, challenging the refusal by the New York Gaslight Club, Inc. to hire the Plaintiff in August, 1974 or thereafter notwithstanding the existence of waitress positions.

14. As of February, 1976, the Gaslight Club, Inc. employed only approximately five Black employees out of a total employee force of approximately eighty persons; and said Black employees included several musicians and several persons in the kitchen. Save for perhaps two waiters, the New York Gaslight Club, Inc. has virtually no Black employees in visible positions. The New York Gaslight Club, Inc. has no Black employees in management positions or on its Board of Directors.

15. In February, 1975, the Plaintiff filed a Complaint with the New York State Division of Human Rights challenging the New York Gaslight Club's refusal to hire her. Those proceedings continue to date with the New York

Gaslight Club, Inc. now seeking review of the Division Order, as affirmed by the New York State Human Rights Appeal Board, which Order found that the New York Gaslight Club, Inc. had violated the Human Rights Law of the State of New York. Said review is now being sought pursuant to a special proceeding in the Supreme Court, Appellate Division—First Department.

16. The plaintiff, by background and otherwise, is a highly competent person to be employed as a waitress at the Gaslight Club, Inc. in New York. As previously noted, the Assistant Manager of the New York Gaslight Club, Inc., Mr. Ray Angelic, himself, found the Plaintiff's singing ability and appearance satisfactory for employment with and by the New York Gaslight Club, Inc.

17. It is not believed that Mr. John Anderson, then the Manager of the New York Gaslight Club, Inc. and the person responsible for hiring individuals, interviewed the Plaintiff.

18. The refusal of the New York Gaslight Club, Inc. to employ the Plaintiff as a waitress was arbitrary, capricious and racially discriminatory and violative of the Plaintiff's rights as guaranteed by the Thirteenth Amendment to the United States Constitution and the Civil Rights Acts of 1871 and 1964, as amended (42 U.S.C. Section 1981 and 42 U.S.C. Section 2000 (e) *et seq.*).

WHEREFORE, Plaintiff respectfully prays that this Court assume jurisdiction of this cause, set the matter down for hearing, and:

Complaint—United States District Court for the Southern District of New York

1. Declare the actions, inaction, policies and practices of the Defendants, as challenged herein, to be arbitrary, capricious and racially discriminatory.
2. Declare the refusal of the Defendants to hire the Plaintiff as arbitrary, capricious, and racially discriminatory and violative of her rights as guaranteed by the Thirteenth Amendment to the United States Constitution and the Civil Rights Acts of 1871 and 1964, as amended (42 U.S.C. Section 1981 and 42 U.S.C. Section 2000 (e) *et seq.*).
3. Require the Defendants to hire the Plaintiff to a position in said Club with all benefits attendant thereto, including the accrual of all monetary and other benefits which she would have obtained if she had been hired in August, 1974 when she applied for a position.
4. Award the Plaintiff back pay with interest.
5. Award the Plaintiff costs and attorneys fees.
6. Award the Plaintiff such other and further relief as the Court deems just and reasonable.

Respectfully submitted,

NATHANIEL R. JONES, ESQ.
GEORGE E. HAIRSTON, ESQ.
JAMES I. MEYERSON, ESQ.
N.A.A.C.P.—1790 Broadway
New York, New York 10019
(212) 245-2100
Attorneys for Plaintiff

By: JAMES I. MEYERSON

Order of Henry F. Werker, *D.J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 4794 (HFW)

MS. CIDNI CAREY,

Plaintiff,

—v—

NEW YORK GASLIGHT CLUB, INC., *et al.*,

Defendants.

ORDER

HENRY F. WERKER, *D.J.*

The New York State Division of Human Rights having directed that the defendant club offer plaintiff a position as a waitress and having made an award of back pay, and

All possible appeals from that decision having been exhausted after the filing of this action,

It is hereby ORDERED that the complaint in the instant action be dismissed and the case forthwith marked off the calendar.

So ORDERED.

July 27, 1978

/s/ HENRY F. WERKER,
U.S.D.J.

FILED
U. S. DISTRICT COURT
S.D. OF N.Y.
JUL 27 1978

Affidavit of James I. Meyerson in Support of Application for Attorneys Fees

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

77 Civ. 4794

MS. CIDNI CAREY,

Plaintiff,

VS

NEW YORK GASLIGHT CLUB, INC., *et al.*,

Defendants.

AFFIDAVIT IN SUPPORT OF APPLICATION
FOR ATTORNEYS FEES

JUDGE HENRY WERKER
STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

James I. Meyerson, being first duly sworn, deposes and says:

1. I am one of the attorneys for the Plaintiff herein; and I execute this Affidavit in that capacity.

2. I have the sole responsibility for the preparation and prosecution of this federal litigation, including the application now pending before this Court.

3. Previously I was almost entirely responsible (although not exclusively responsible) for the preparation

and prosecution of the administrative proceedings in the New York State Division of Human Rights (as a consequence of the deferral thereto by the New York District Office of the Equal Employment Opportunity Commission after the Plaintiff herein initially filed a complaint with said Commission charging the Defendant New York Gaslight Club, Inc. with racially discriminatory conduct).

4. In addition, I was exclusively responsible for the representation of the Plaintiff herein in administrative and judicial proceedings subsequent to the proceeding before the New York State Division of Human Rights (including the proceedings before the New York State Human Rights Appeal Board, an entity separate and apart from and independent of the New York State Division of Human Rights, and proceedings before the New York State Supreme Court/Appellate Division—First Judicial Department and the New York State Court of Appeals).

5. As a consequence of my efforts in this proceeding and in the proceedings convened prior to the institution of this federal action but in connection therewith (as a consequence of the interrelatedness by and between state proceedings and federal Title VII enforcement effort—per the federal statutory scheme), I undertook the following: After consultation with the Plaintiff, preparation and filing of Complaint with the New York District Office of the Equal Employment Opportunity Commission; Preparation and presentation of evidence before the New York State Division of Human Rights (subsequent to the filing of a complaint therein by the Plaintiff as a consequence of the federal referral and deferral thereto); Preparation and

submission of Post Hearing Brief (Memorandum) to the Hearing Examiner (Norman Mednick) in the New York State Division of Human Rights; Preparation and submission of papers in opposition to the Defendants Motion to the New York State Human Rights Appeal Board for a stay pending the outcome of their appeal to said Board from the decision of the New York State Division of Human Rights (which was favorable to Plaintiff); Preparation and submission of Brief to the New York State Human Rights Appeal Board; Preparation and submission of papers and Brief to the New York State Supreme Court/ Appellate Division—First Judicial Department in response to appeal thereto by the Defendants from the decision in both the New York State Division of Human Rights and the New York State Human Rights Appeal Board (which decisions were adverse to said Defendants); Preparation and submission of papers in opposition to Motion of the Defendants to the New York State Supreme Court/Appellate Division—First Judicial Department for Reargument from the unanimous decision of that Court which affirmed the administrative decisions or in the alternative for Leave to File an Appeal with the New York State Court of Appeals in this matter (which Motion was ultimately denied); Preparation and submission of papers in opposition to the Motion to the New York State Court of Appeals by the Defendants requesting said Court to assume jurisdiction of an appeal from the foregoing decision and orders of the Appellate Division (which Motion before the Court of Appeals was denied); Preparation and submission of Complaint to this Court (pursuant to the Notice of Right to Sue Letter received by the Plaintiff from the Equal Employ-

ment Opportunity Commission); Preparation of papers to this Court in connection with the pending issue (regarding attorneys' fees), including the submission of a memorandum (and preparation thereof) and the preparation and submission of affidavits (including the one herein) attendant thereto.

6. In connection with the foregoing, I spent the following hours relative thereto:

a. Consultation and drafting of Complaint to the Equal Employment Opportunity Commission (5 hours).

b. Preparation and presentation of evidence before the New York State Division of Human Rights (7 hours).

c. Preparation and submission of Post Hearing Brief to the New York State Division of Human Rights (15 hours).

d. Preparation and submission of papers in opposition to application by the Defendants for a stay pending appeal to the New York State Human Rights Appeal Board (5 hours).

e. Preparation and submission of Brief to the New York State Human Rights Appeal Board (8 hours).

f. Preparation and submission of Brief to New York State Supreme Court/Appellate Division—First Judicial Department (8 hours).

g. Preparation and submission of papers in opposition to Motion of Defendants to Appellate Division

for Reargument or otherwise for leave to appeal to the New York State Court of Appeals (3 hours).

h. Preparation and submission of Brief to New York State Court of Appeals in Opposition to Motion of Defendants for Leave to Appeal thereto (from the adverse decision(s) of the Appellate Division—First Judicial Department) (5 hours).

i. Preparation and submission of Complaint to the United States District Court for the Southern District of New York (4 hours).

j. Preparation of Memorandum in support of Application for Attorneys' Fees and Affidavits attendant thereto (22 hours).

7. The total amount of time spent in this matter, as set forth above, is eighty two (82) hours. Included in said time was research, writing, communication with counsel for the Defendants, my client, and counsel for the New York State Division of Human Rights. All of the aforementioned takes into account the various efforts attendant to research and presentation, including examination of information received and documents prepared by counsel for the Defendants and counsel for the New York State Division of Human Rights.

8. In addition to the foregoing, Plaintiff's counsel has spent substantial numbers of hours in attempting to work out the implementation of the decretal order issued by the New York State Division of Human Rights, something which has not, to this date, been completed (at least relative to the resolution of the backpay award, still unpaid). I

have not set forth any of the hours attributable to the efforts in this respect.

9. I am seeking the sum of one hundred dollars per hour ($100.00 per hour) for my efforts herein.

10. I believe that, in view of my experience, the nature of the case herein, and the favorable resolution of the matter to the Plaintiff, the sum of one hundred dollars ($100.00) per hour is not unreasonable.

11. I graduated from Syracuse University College of Law in 1969 with a J.D. Degree. Prior to that I secured a B.A. Degree from the University of Pittsburgh (graduating therefrom in June, 1966).

12. Upon completion of my law studies, I took the bar examination for admittance to practice before the courts of the State of New York, in the summer of 1969; and I passed said examination.

13. I enlisted in VISA in September, 1969, and became associated with the Charlotte-Mecklenburg Legal Aid Society in North Carolina for the next approximately thirteen months.

14. In October, 1970, I became associated with the Office of the General Counsel of the National Association of the Advancement of Colored People as Assistant General Counsel; and I continue to be associated therewith and hold the same position to date.

15. During the seven and one half years which I have been associated with the afore-mentioned office I have been

involved in approximately ninety civil rights efforts, most of which involved some court dynamic (although not exclusively) and a great many of which I was involved in (court-wise) in one form or another.

16. I have been involved in approximately thirty (30) efforts wherein I have been primarily, if not sometimes exclusively, responsible for the preparation and prosecution of the entire case (including pre-trial discovery, the trial and the post trial effort, including all aspects of the appellate level work). These cases have been largely federal court cases although it does include some state court work (including the trial and appellate level) and some federal and state administrative work (wherein both conciliation and adjudicatory efforts were undertaken).

17. Included among the cases in which I have been primarily, if not solely, responsible are the following: *State* v. *Rogers,* where, with two other attorneys, I defended a young Black individual who had been accused of rape. Said trial took place in Fort Smith, Arkansas. Said youth was convicted and sentenced to life without parole. State appellate process pursued, unsuccessfully (with dissent); and a federal habeas corpus (in which I am solely responsible) is now pending in the Eastern District of Arkansas (*Rogers* v. *Britton*); *Russ* v. *Ratliff,* wherein I was primarily responsible for preparation and prosecution of wrongful death case (shooting death of Black man by white Star City, Arkansas policeman) in federal court before twelve-person jury. Verdict was rendered against us and, upon appeal (solely prepared and prosecuted by me), the United States Court of Appeals for the Eighth Circuit reversed the jury

verdict and set it aside, finding and holding that, if the civil rights acts are to have any meaning, the verdict could not stand. We are presently back before the Eighth Circuit regarding, responsibility, if any, of the City of Star City, Arkansas once damages are assessed; ar a related matter, I was primarily responsible for the preparation and prosecution of the civil action encaptioned *The N.A.A.C.P., etc., et al.* v. *Bell, etc., et al.,* a decision of which was just rendered by the United States District Court for the District of Columbia, the Honorable Barrington Parker, presiding, wherein I was awarded attorney's fees of approximately $25,000.00 (twenty-five thousand dollars) based on the rate of $100.00 (one hundred dollars) per hour. A copy of said decision is attached hereto and made part hereof. Said Court took note of my reputation in the area of civil rights as principal attorney in that matter; *Hart* v. *Community School Board,* is the first New York City school desegregation matter decided by a federal court. I was solely responsible for the preparation and prosecution of the trial as well as all of the appellate aspects thereof (of which there were several aspects). A finding of liability rendered by the District Court was affirmed by the Second Circuit with the so-called "Hart standard" becoming a national standard of which there has been much written by academicians and the Court since it was enunciated; at present there is pending before the United States District Court for the Eastern District of New York, the Honorable John F. Dooling, Jr., presiding, the case of *The Parent Association of Andrew Jackson High School* v. *Ambach,* still another New York City school desegregation matter in which I was solely responsible for the preparation and prosecution thereof; *Patterson* v. *City of Syracuse,* a matter which I

was almost exclusively responsible for preparing and prosecuting in the New York State Division of Human Rights and which is believed to contain one of the largest records of a matter adjudicated therein (in excess of four thousand pages). We were partially successful and proceedings attendant thereto followed (in both the administrative appeal level and in the various New York State appellate courts); *Herring* v. *City of Syracuse* is a wrongful death matter which I tried along with George E. Hairston, Esq., one of the co-counsel for the Plaintiff herein. Said matter was tried before a jury of six persons in Syracuse, New York (the Supreme Court/Onondaga County) and a non-unanimous verdict was rendered. Matter is now on appeal before the Appellate Division/Fourth Judicial Department; in this Court and before your Honor, I did prepare and prosecute the matter of *Jackson* v. *New York City Health and Hospitals Corporation*, a case wherein we sought a preliminary injunction to foreclose the City from closing Morrisania Hospital. This Court denied said relief (after a hearing) and dismissed said action; in *Snead* v. *Department of Social Services*, this Court, by Judge Weinfeld sitting and writing for a three-judge panel, held Section 72 of the New York Civil Service Law unconstitutional. Said decision was ultimately vacated by the United States Supreme Court *on other gounds*.

18. The foregoing represent a sampling of the many, many cases in which I have been involved and continue to be involved.

19. Based on the foregoing and the attached decision, I do believe that the fee which I am requesting herein

is reasonable and justified, recognizing that any Human Rights case/civil rights case/civil liberties case is inherently difficult notwithstanding that some are of course more difficult than others and that the fact pattern herein was concededly simpler than many of those matters which I otherwise undertake and handle.

20. As noted the foregoing is not an exhaustive list, by any stretch, of the matters in which I have been involved singularly or in conjunction with others.

21. I have argued matters in the United States Courts of Appeal for the Second Circuit, Fifth Circuit, Sixth Circuit, Eighth Circuit, Tenth Circuit and the Court of Appeals for the District of Columbia. I have tried cases and otherwise been involved in proceedings before the United States District Courts for the District of Columbia, the Northern District of Florida, the Southern District of Ohio, the Eastern District of Arkansas, the Southern District of Mississippi, the Eastern District of Oklahoma, the Northern District of New York, the Western District of New York, the Eastern District of New York and the Southern District of New York.

22. I believe myself to be a reasonably experienced civil rights litigator and appellate advocate; and I believe that said reasonable experience is manifested by the foregoing discussion.

WHEREFORE and in view of the foregoing, I respectfully request that I be awarded the sum of $8200.00 (eighty-two hundred dollars) as reasonable attorney's fee for efforts in this matter (consistent with the Memorandum of Law which

Affidavit of James I. Meyerson in Support of Application for Attorneys Fees

permits such an award and encourages the same in view of the policy purpose of Title VII of the Civil Rights Act of 1964).

Respectfully submitted,

/s/ James I. Meyerson, Esq.
James I. Meyerson, Esq.

(Sworn to by James I. Meyerson, Esq. on April 17, 1978.)

Supplemental Affidavit of James I. Meyerson

In the
UNITED STATES DISTRICT COURT
For the Southern District of New York
77 Civ. 4794

Ms. Cidni Carey,
Plaintiff,

vs

New York Gaslight Club, Inc., *et al.*,
Defendants.

Supplemental Affidavit

Judge Henry Werker
State of New York,
County of New York, *ss.:*

James I. Meyerson, being first duly sworn, deposes and says:

1. I am one of the attorneys for the Plaintiff herein; and I execute this Affidavit in that capacity.

2. I have been primarily (almost solely) responsible for all of the representation of the Plaintiff herein and through the state administrative and judicial proceedings which have transpired heretofore.

3. In my initial Affidavit herein, submitted contemporaneously with Plaintiff's Memorandum in Support of her

Application for Attorneys' Fees herein, I mis-spoke in Paragraph #32 (as well as in the Memorandum wherein I reiterate said error).

4. I noted in Paragraph #32 that Plaintiff never requested that the Equal Employment Opportunity Commission reassume jurisdiction over this matter, pursuant to Title VII provisions and subsequent to the initial deferral by said Commission after the Plaintiff had initially filed her complaint against the Defendants with said Commission.

5. However, in reviewing my letter to Mr. Frank Patterson, Supervisor/Case Control, New York District Office of the Equal Employment Opportunity Commission, dated May 20, 1975, a copy of which is attached to my initial Affidavit and a copy of which is attached hereto, it is obvious that I did request that the Equal Employment Opportunity Commission reassume jurisdiction over the complaint, it being more than sixty (60) days since the matter was deferred to the New York State Division of Human Rights by said Commission.

6. Said letter makes it known that the Plaintiff was seeking for the Commission to assume (reassume) jurisdiction should it be necessary for the Plaintiff to secure a Notice of Right to Sue Letter.

7. Referring to my letter of June 2, 1975 to the Plaintiff, a copy of which is attached to my first Affidavit and a copy of which is attached hereto, we did believe that the Commission, per our request, did implicitly, if not explicitly, advise us in its letter to me, dated May 22, 1975 (a copy of which is attached to my initial Affidavit and a copy of which is attached hereto), that it had reassumed jurisdiction over Plaintiff's matter.

8. As I advised the Plaintiff, it was my understanding (and still remains my understanding) that the Equal Employment Opportunity Commission has a tremendous case load making it likely that an investigation of the complaint by said Commission would not and will not be undertaken for approximately one year (if not more) from the time that said Commission reassumes jurisdiction.

9. It is apparent that the Plaintiff herein viewed her efforts in the New York State Division of Human Rights as a very integral part of her federal Title VII effort.

10. Certainly, once the Plaintiff secured a favorable verdict by and through the State Division of Human Rights as a consequence of the deferral action, the Plaintiff did view said proceedings as the primary mechanism for resolving the controversy which had been initiated by the filing of the complaint with the Equal Employment Opportunity Commission (without the need for Commission efforts or federal court litigation).

11. It was through the deferral and the ultimate resolution in the New York State Division of Human Rights that the Plaintiff secured relief relative to her Title VII complaint.

12. As a matter of fact, the congressional statutory scheme envisioned just such a dynamic (thus the reason

for including in that federal statutory scheme deferral reference to state proceedings).

13. It is obvious that the Equal Employment Opportunity Commission did not begin its efforts in this matter until on or about November, 1976, well over one year after it assumed (reassumed) jurisdiction herein; and that, when it did the same, it learned that the Plaintiff had been successful in the New York State Division of Human Rights, as a consequence of the deferral, and that, accordingly, there was really nothing at that point in time to do since the matter had, in effect, been resolved.

14. It should be noted that the matter in the State Division of Human Rights was not resolved, voluntarily, through conciliation efforts; but rather was resolved through an administrative adjudicatory process whereat hearings were held, evidence produced, and briefs ultimately submitted. At the conclusion of said administrative trial, the New York State Division of Human Rights did issue a Decision and Order in favor of the Plaintiff.

It is submitted, then, that the efforts in the New York State Division of Human Rights, by which this federal Title VII matter was, in effect, resolved, were and are intricately a part of the "proceedings" envisioned with the federal statutory Title VII scheme.

WHEREFORE, Plaintiff respectfully requests that she be awarded appropriate attorneys' fees for her efforts under-

taken in the New York State Division of Human Rights and in other proceedings related thereto.

Respectfully submitted,

.....

JAMES I. MEYERSON, ESQ.
N.A.A.C.P.—1790 Broadway
New York, New York 10019
(212) 245-2100
Attorney for Plaintiff

By: /s/ JAMES I. MEYERSON

(Sworn to by James I. Meyerson on April 15, 1978.)

Motion Seeking Modification of Memorandum Decision and Order and Seeking Leave to Supplement the Record Herein (Rule 52) and Affidavit Annexed Thereto

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

77 Civ. 4794

MS. CIDNI CAREY,

Plaintiff,

VS

NEW YORK GASLIGHT CLUB, INC., *et al.*,

Defendants.

Now comes the Plaintiff herein, by and through her attorneys, and respectfully moves this Court to modify its Memorandum Decision Order, handed down on September 15, 1978 and entered with the Clerk on September 21, 1978 (a copy of which is attached hereto). In addition, the Plaintiff seeks leave of this Court to supplement the record herein upon which the Application for Attorneys' Fees is premised. Said Motion is brought pursuant to Rule 52 of the Federal Rules of Civil Procedure.

Respectfully submitted,

NATHANIEL R. JONES, Esq.
JAMES I. MEYERSON, Esq.
1790 Broadway—10th Floor
New York, New York 10019
(212) 245-2100
Attorneys for Plaintiff (Moving Party)

/s/ JAMES I. MEYERSON

Motion Seeking Modification of Memorandum Decision and Order and Seeking Leave to Supplement the Record Herein (Rule 52) and Affidavit Annexed Thereto

AFFIDAVIT OF JAMES I. MEYERSON

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

JAMES I. MEYERSON, Esq., one of the attorneys for the Plaintiff herein (Moving Party), being first duly sworn, deposes and says:

1. I am one of the attorneys for the Plaintiff herein; and I execute this Affidavit in that capacity. I am fully with all of the proceedings which have transpired to date in this matter (administratively and otherwise) as I have had the primary (and sometime sole) responsibility for the preparation and prosecution of all aspects of this matter on behalf of Ms. Carey, the Plaintiff herein and the Complainant in the proceedings before the New York State Division of Human Rights.

2. By its decision and order, dated September 15, 1978 and entered with the Clerk of the Court on September 21, 1978, this Court denied to the Plaintiff's attorneys attorneys' fees for their successful preparation and prosecution of the proceeding before the New York State Division of Human Rights.

3. At page three of said decision, this Court wrote:

> "The plaintiff had the option of pursuing her state administrative remedies without incurring any expenses at all for legal services since section 297 of the New York Human Rights Law provides that the 'case in support of the complaint shall be presented by one of

> the attorneys or agents of the Division.' Rather than availing herself of such free representation the plaintiff chose to be represented by privately retained counsel."

4. Plaintiff's counsel received formal notification of the entry of the Memorandum Decision and Order, from which the above quote is excerpted, on September 27, 1978. A copy of said notification is attached hereto and made part hereof (having thereon the date notation on which the document was received in the office of Plaintiff's counsel). On September 28, 1978, Plaintiff's counsel did obtain a copy of the Memorandum Decision in the Office of the Opinion Clerk, United States District Court, Southern District of New York.

5. Upon reading the same and particularly the above excerpted quote, the Plaintiff's counsel did call the New York State Division of Human Rights, Office of the General Counsel, and did speak with one attorney therein with whom he had previously associated in Division proceedings.

6. It has always been my position that the Division attorney, when ostensibly representing the complainant in a Division proceeding, is, in reality and in theory, representing the Commissioner of the New York State Divison of Human Rights, upon the complaint, and not the complainant himself/herself.

7. Thus in a proceeding where the complainant does not prevail (by Commissioner's decision and order) and is represented by the Division attorney (ostensibly), the Division attorney cannot appeal the adverse decision, upon the complaint and for the complainant, because such would be be inconsistent with the finding of the Commissioner whom the Division attorney, in reality and in theory, represents.

8. Moreover, where the complainant secures only partial relief, upon prevailing, and seeks further relief in an appeal, the Division attorney will not represent the complainant in said effort since to do so would be inconsistent with the position of the Commissioner, whom said attorney represents upon the complaint of the charging party.

9. Furthermore, where a party prevails before the Commissioner and an appeal is prosecuted by the non-prevailing party to the Appeal Board and the decision is reversed by the Appeal Board (against the complainant and the Commissioner), nevertheless it is believed that the Division attorney (who would appear before the Appeal Board to justify the decision of the Commissioner, upon the complaint of the charging party) would not and cannot appeal the decision of the Appeal Board to the Courts of the State of New York.

10. All of the aforementioned was confirmed to me by an attorney in the Office of the General Counsel of the New York State Division of Human Rights (per my telephone conversation with her on Thursday, September 28, 1978).

11. It is apparent, therefore, that the Division attorney does not represent the complainant (charging party) but rather the Commissioner, upon the complaint of the charging party.

Motion Seeking Modification of Memorandum Decision and Order and Seeking Leave to Supplement the Record Herein (Rule 52) and Affidavit Annexed Thereto

12. It is apparent, as well, in the instant case, the Division attorney represented the Commissioner and not the Complainant.

13. Thus it is submitted that it is error to hold, as this Court did, that the Plaintiff herein had the option of obtaining a Division attorney where, it is apparent, that the attorney represents the Commissioner, upon a complaint and not the complainant, and where, it is apparent, that conflict in that representation effectively denies to the complainant effective representation.

14. It was error, as well, for the Court to hold that the Plaintiff herein went out and retained private counsel. The Complainant did not have funds to secure a private attorney and did not pay any monies to the attorneys, employed by the N.A.A.C.P. Special Contribution Fund, Inc., who did, in fact, represent the Plaintiff (more specifically, James I. Meyerson, Esq.).

15. James I. Meyerson, Esq., as employed by the N.A.A.-C.P., undertook to represent Ms. Carey in the public interest and as a private attorney general seeking to enforce the federal laws and policies against employment discrimination (as set forth more fully in Title VII of the Civil Rights Act of 1964, as amended—42 U.S.C. Section 2000(e) *et seq.*).

16. To the extent that the proceedings eventually took place in the New York State Division of Human Rights, they did so as a consequence of federal deferral under the federal law and rules governing Title VII complaints.

Motion Seeking Modification of Memorandum Decision and Order and Seeking Leave to Supplement the Record Herein (Rule 52) and Affidavit Annexed Thereto

17. Thus, if the Plaintiff herein had not secured the public interest attorneys employed by the N.A.A.C.P. (and had not been able to obtain other public interest attorneys), she would not have had, in fact, a full and complete representation in the Division proceedings (to the extent that the Division attorneys represent the Commissioner rather than the complainant—upon the complaint of the charging party).

In view of the foregoing, Plaintiff herein submits that this Court should modify its findings and otherwise amend its conclusion and award Plaintiff's counsel attorneys' fees upon the application heretofore submitted. In addition, Plaintiff requests leave to supplement the record herein with further evidence corroborating the statements herein made (statements made in light of the apparent misunderstanding by the Court of the responsibility and representative capacity of the State Division attorney in a State Division proceeding).

Respectfully submitted,

JAMES I. MEYERSON, Esq.
N.A.A.C.P.—1790 Broadway
New York, New York 10019
(212) 245-2100
Attorney for Plaintiff

/s/ JAMES I. MEYERSON

(Sworn to by James I. Meyerson on September 29, 1978.)

Affidavit of Adele Graham

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MS. CIDNI CAREY,

Plaintiff,

—against—

NEW YORK GASLIGHT CLUB, INC., *et al.*,

Defendants.

AFFIDAVIT

ADELE GRAHAM, being duly sworn, deposes and says:

1. I am an attorney on the staff of ANN THACHER ANDERSON, General Counsel of the State Division of Human Rights, and am assigned to the position of Supervisor of the Administrative Hearing Section. As such, I am fully familiar with the practices of the State Division of Human Rights, particularly with respect to the presentation of cases at public hearings, for which I bear the primary responsibility, as well as on appeals thereof. I make this affidavit at the request of JAMES I. MEYERSON, Esq., attorney for the plaintiff in the above-entitled action. I have read Mr. Meyerson's motion and the defendant's memorandum submitted in opposition.

2. The hearing caseload of the Division of Human Rights has more than doubled in the last three years, and doubled as well in the previous three or four years, while the staff of attorneys available to handle the cases has

been approximately halved. As a result, it became necessary drastically to revise the Division's procedures with respect to the presentation of such cases at public hearing.

3. One of the major methods utilized was the elimination of the prior practice of assigning a Division attorney to every case. Complainants were encouraged to obtain private counsel and, in the overwhelming majority of such cases, the Division attorneys' participation in the presentation of the cases at public hearing routinely was reduced to administrative duties and occasional consultation about procedures. This practice was subsequently codified in a major revision of the Division's Rules of Practice 9 NYCRR § 465, promulgated October 18, 1977. See § 465.11, *Representation by an attorney.*

4. The Division's records reveal that such practice was followed in the public hearing of *Carey* v. *New York Gaslight Club, Inc.* The Division attorney did not appear at all during the extensive two day trial at which the complete record was made; the entire burden of placing evidence into the record, and arguing the significance thereof, was borne by the attorney for the plaintiff.

5. Even before the practice of assigning a Division attorney to each hearing case changed, as aforestated, the Division made a distinction with respect to its obligations under § 297.4(a) of the Human Rights Law. This distinction was based upon the two disjunctive sentences therein: "The case in support of the *complaint* shall be presented by one of the attorneys or agents of the Division and, at the option of the complainant, by his attorney. With the consent of the Division, the case in support of the *com-*

plainant may be presented solely by his attorney." (Emphasis supplied.) The Division interpreted this statutory language as requiring a distinction between the *complaint* which the Division was required to further, and the *complainant,* whose private interests might or might not be identical with the public interests represented by the Division. There is not infrequently some substantial difference between the public interest the Division has in the complaint, and the private interests of the complainant. In presenting a case at public hearing, or in settling a public hearing case, the Division attorney is instructed that his/her primary responsibility is the protection of the public interest.

6. The quoted language of § 297.4(a) as to the obligations of the Division attorney to the complaint refers only to the public hearing aspect of a case. The entire Section § 297.4(a) spells out the procedures for public hearings, only. The Defendants' memorandum, at page 3, obviously misreads the statute on this point. Appeals to the State Human Rights Appeal Board and to the appropriate State courts are covered procedurally by §§ 297-a and 298. No specific reference is contained in those sections as to the Division's obligations to argue appeals.

7. The Division is however authorized to obtain enforcement of its order or of the order of the State Human Rights Appeal Board, by the terms of § 298, and has historically read into that obligation the implicit power to argue for affirmance of its orders on a respondent's appeal thereof. This power is exercised on behalf of the Division, seeking to uphold its order, and not on behalf of the complainant.

8. The Division's actions before the Board and the Courts in upholding its Order may readily be seen as distinct from the situation obtaining when the complainant is dissatisfied with an Order after Hearing. The Division, through counsel, does not participate in such an appeal on behalf of the complainant, who must pursue an appeal either *pro se* or through private counsel. The Division's legal staff must support the Commissioner's Order After Hearing, even though such support is inimical to the interests of the complainant.

9. Illustrative of the lack of identity of interest between the Division and the complainant may be seen in several recent matters where the Order After Hearing upheld the complaint, but full relief was not awarded to the complainants. The complainants were then required to take appeals in order to obtain such full relief, but without the legal assistance of the Division.

10. In another recent case, the State Human Rights Appeal Board reversed an Order After Hearing favorable to a complainant. The Division was unable lawfully to provide legal counsel since it is bound, by the terms of § 297-a of the Human Rights Law, to the decisions of the board. The complainant had to secure private counsel to prosecute a successful appeal of that reversal to the Appellate Division, Fourth Department.

/s/ ADELE GRAHAM
Adele Graham

(Sworn to by Adele Graham on October 18, 1978.)

Complaint—New York State Division of Human Rights

STATE OF NEW YORK

EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS

on the complaint of

CIDNI CAREY,

Complainant,

—against—

GASLIGHT CLUB; RAY ANGELIC, Manager
& JOHN ANDERSON, Manager,

Respondent.

I, Ms. Cidni Carey residing at 61-25 98th Street, Rego Park, N.Y. 11374 Tel. No. ..... charge Gaslight Club whose address is 124 E. 56th St., NYC Tel. No. PL 2-2500 with an unlawful discriminatory practice relating to employment on or about August 26, 1974 by refusing to hire me because of my AGE ( ), RACE (xx), CREED ( ), COLOR (xx), NATIONAL ORIGIN ( ), SEX ( ).

The particulars are:

1. On Monday, August 26, 1974, I went to the Gaslight Club to apply for a job as a waitress. Prior to appearing at the Gaslight Club, I called to make sure that positions were open, at that time I was asked to come to the Club for an interview.
2. I was interviewed by Mr. Ray Angelic and Mr. John Anderson, Managers of the Club. They are both

White. They told me I had all the qualifications for the job, but I was not hired.

3. On information and belief, the Gaslight Club has no Black waitresses. A White waitress was given the job for which I had applied.
4. I am Black. Based on the foregoing, I charge the Gaslight Club; Ray Angelic and John Anderson, Managers, with discriminating against me by refusing to hire me because of my race and color, in violation of the Human Rights Law of the State of New York.

By reason of the unlawful discriminatory practice of respondent as herein alleged, complainant has already suffered damages in the sum of $ unspecified.

I have not commenced any civil, criminal or administrative action or proceeding in any court or administrative agency based upon the same grievance.

/s/ CIDNI CAREY

(Sworn to by Cidni Carey on February 21, 1975.)

Order, Findings and Decision of New York State Division of Human Rights

STATE OF NEW YORK

EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS

Case No. (S) CF-36685-75

STATE DIVISION OF HUMAN RIGHTS

on the complaint(s) of

CIDNI CAREY,

Complainant,

—against—

THE NEW YORK GASLIGHT CLUB, INC., RAY ANGELIC, Assistant Manager, and JOHN ANDERSON, Manager,

Respondents.

NOTICE OF ORDER AFTER HEARING

SIRS:

PLEASE TAKE NOTICE that the within is a true copy of an Order issued herein by Werner H. Kramarsky, Commissioner of the State Division of Human Rights, after a hearing held before Hearing Examiner Norman Mednick, Esq. In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at 2 World Trade Center, New York, New York 10047. The Order may be inspected by any member of the public during the regular office hours of the Division.

Order, Findings and Decision of New York State Division of Human Rights

PLEASE TAKE FURTHER NOTICE that in accordance with Section 297-a of the New York State Human Rights Law, any party to the proceeding aggrieved by said Order of the Division may obtain review thereof in a proceeding before the State Human Rights Appeal Board, 2 World Trade Center, 82nd Floor, New York, New York 10047, provided such appeal is commenced by the filing with the Board of a notice of appeal within fifteen (15) days after the service of this Order.

DATED: AUG 13 1976
NEW YORK, NEW YORK

STATE DIVISION OF HUMAN RIGHTS

/S/ WERNER H. KRAMARSKY
Werner H. Kramarsky
Commissioner

To:

Ms. Cidni Carey
61-25—98 Street
Rego Park, New York 11374

The New York Gaslight Club, Inc.
124 East 56 Street
New York, New York 10022

Mr. Ray Angelic
8 Grandview Avenue
Pawling, New York

Mr. John Anderson
525 East 89 Street
New York, New York

Order, Findings and Decision of New York State Division of Human Rights

Kane, Kessler, Proujansky, Preiss & Permutt, P.C.
Albert N. Proujansky, Esq., *of Counsel*
680 Fifth Avenue
New York, New York 10019

James I. Meyerson, Esq.
George Hairston, Esq., *of Counsel*
NAACP Special Contribution Fund
1790 Broadway
New York, New York 10019

Bevery Gross, Esq., *General Counsel*
Terry Myers, Esq., *of Counsel*
State Division of Human Rights
2 World Trade Center
New York, New York 10047

Hon. Louis J. Lefkowitz
Attorney General
2 World Trade Center
New York, New York 10047

Order, Findings and Decision of New York State Division of Human Rights

STATE OF NEW YORK

EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS

Case No. (S) CF-36685-75

STATE DIVISION OF HUMAN RIGHTS

on the complaint(s) of

CIDNI CAREY,

Complainant,

—against—

THE NEW YORK GASLIGHT CLUB, INC., RAY ANGELIC, Assistant Manager, and JOHN ANDERSON, Manager,

Respondents.

PROCEEDINGS IN THE CASE

On the 21st day of February, 1975, the above-named Complainant filed a complaint, thereafter amended, with the State Division of Human Rights (hereinafter the "Division"), charging the above-named Respondents with an unlawful discriminatory practice relating to employment, in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondents had engaged in an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

Order, Findings and Decision of New York State Division of Human Rights

After due notice, the case came on for hearing before Norman Mednick, Esq., a Hearing Examiner of the Division. The hearing was held on September 22, 1975, and on January 15, 1976.

Complainant was represented by George Hairston, Esq., and Jame I. Meyerson, Esq. Respondents were represented by Kane, Kessler, Proujansky, Preiss & Permutt, P.C., by Albert N. Proujansky, Esq., of Counsel. The Division was represented by Terry Myers, Esq.

FINDINGS OF FACT

1. Complainant, Cindi Carey, is Black.

2. At all times herein pertinent, Respondent, The New York Gaslight Club, Inc., is a club commonly known as the Gaslight Club (hereinafter Respondent "Club"), and located at 124 East 56 Street, New York, New York.

3. At all times herein pertinent, Respondent Ray Angelic was employed by the Respondent Club as Assistant Manager.

4. At all times herein pertinent, Respondent John Anderson was employed by the Respondent Club as Manager.

5. On or about August 26, 1974, Complainant visited the Respondent Club and applied for a job as an evening cocktail waitress.

6. Evening cocktail waitresses in the employ of the Respondent Club are required to sing and dance.

Order, Findings and Decision of New York State Division of Human Rights

7. Complainant met Respondent Anderson who asked that she sing for Respondent Angelic; Complainant was not asked to dance.

8. At no time thereafter did the Respondent Club offer the Complainant a job as an evening cocktail waitress.

9. From on or about August 27, 1974, to on or about November 21, 1975, the Respondent Club hired at least 11 evening cocktail waitresses, all of whom are Caucasian.

10. Respondent Angelic did not have the authority to hire waitresses; Respondent Anderson had the sole power to hire waitresses.

11. Applicants for evening cocktail waitress positions are not interviewed by Respondent Anderson unless screened and approved by Respondent Angelic.

12. The record shows that Respondent Angelic screened and approved the Complainant and that she was qualified to be an evening cocktail waitress for the Respondent Club.

13. I find that Respondent Anderson did not hire Complainant because of her race and color.

14. The Respondent Club is responsible for the discriminatory acts committed by its agents or employees.

15. There is no evidence in the record that Respondent Angelic discriminated against the Complainant, in violation of the Human Rights Law.

Order, Findings and Decision of New York State Division of Human Rights

16. As a direct result of the unlawful discriminatory act committed against her, Complainant sustained a loss of wages in the amount of $52.00 per week, computed on the basis of the average weekly earnings of four evening cocktail waitresses during the period October of 1974 through September of 1975.

DECISION

Based upon the foregoing, I find that Respondents, The New York Gaslight Club, Inc. and John Anderson discriminated against Complainant because of her race and color, in violation of the Human Rights Law.

I further find that the awarding of compensatory damages to the aggrieved Complainant will effectuate the purposes of the Human Rights Law.

I further find that Respondent Angelic did not discriminate against Complainant, in violation of the Human Rights Law.

ORDER

Upon the basis of the foregoing Findings of Fact and pursuant to the Human Rights Law, it is hereby

ORDERED, that the complaint against Respondent Ray Angelic be and the same hereby is dismissed, and it is further

ORDERED, that the Respondents The New York Gaslight Club, Inc. and John Anderson, their agents, employees, successors and assigns shall cease and desist from discriminating against any employee or individual in the terms, conditions and privileges of employment because of the race and color of such individual, and it is further

ORDERED, that said Respondent The New York Gaslight Club, Inc. and John Anderson, their agents, employees,

Order, Findings and Decision of New York State Division of Human Rights

successors and assigns shall take the following affirmative action which will effectuate the purposes of the Human Rights Law:

1. Respondents shall, within ten (10) days from the effective date of this Order offer, in writing, to employ the complainant in the position of evening cocktail waitress. Complainant shall have five (5) business days in which to accept or reject the said offer. If Complainant accepts, Respondent The New York Gaslight Club, Inc., shall grant to Complainant all the rights, benefits, privileges and seniority to which she would have been entitled had she been employed as an evening cocktail waitress from August 27, 1974.

2. Respondent, The New York Gaslight Club, Inc., shall within ten (10) days from the effective date of this Order, pay to Complainant as backpay, the sum of $52 per week from August 27, 1974 to the date she accepts or rejects the offer set forth in paragraph 1, above, less any sums earned by Complainant during the said period and hours she would have worked for Respondent, and less the standard payroll deductions. Said payment shall bear interest at the rate of six percent (6%) per annum and the interest shall be computed from a reasonable intermediate date, in accordance with Section 5001 (b) of the CPLR. Said intermediate date shall be the date computed by taking the middle date from August 27, 1974 to the date that the Complainant accepts or rejects the Respondent's offer. Respondent shall furnish proof of payment within ten (10) days thereof to the State Division of Human Rights, Attention Beverly Gross, Esq., General Counsel, 2 World Trade Center, New York, New York 10047.

Order, Findings and Decision of New York State Division of Human Rights

3. Respondents shall send a memorandum to all their supervisory employees, agents and officers, and to all recognized unions or other organizations representing their employees, instructing them that they have a policy of nondiscrimination because of race and color in the treatment of employees, as well as in employment and work assignments, and that such employees, agents and/or representatives are required to implement the said policy.

4. Respondents shall make available to the duly-authorized representative of this Division such documents and information as may be necessary for the Division to ascertain whether there is compliance with this Order.

Dated: August 13, 1978
New York, New York

STATE DIVISION OF HUMAN RIGHTS
WERNER H. KRAMARSKI, *Commissioner*

Petitioner's Counsel's Letter to Judge Henry F. Werker
(Letter, dated February 7, 1978)

LAW OFFICES
KANE, KESSLER, PROUJANSKY, PREISS & PERMUTT, P.C.

SIDNEY S. KESSLER
ALBERT N. PROUJANSKY
EDMUND PREISS
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(212) 541-6222
THOMAS A. KANE
HERBERT RAND
COUNSEL
SAMUEL T. PERMUTT
(1940-1975)

February 7, 1978

Hon. Henry F. Werker
United States District Judge
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

RE: CAREY v. NEW YORK GASLIGHT CLUB, INC., et ano, 77 Civ. 4794 (HFW)

Dear Judge Werker:

After discussion with your Law Clerk at the pretrial conference on February 3, 1978, and thereafter discussion with counsel for the N.A.A.C.P. who concurs in this application, we request that the above-entitled action be placed on the Suspense Calendar pending the determination of a motion, at present pending before the New York State

Petitioner's Counsel's Letter to Judge Henry F. Werker

Court of Appeals, which will be dispositive of most if not all of the issues in this lawsuit.

The plaintiff in this action has been awarded the relief sought herein in New York State Administrative and Court proceedings. The defendants herein have applied to the New York State Court of Appeals for permission to appeal from the affirmance by the Appellate Division of the findings of the New York State Division of Human Rights. Should that application be denied, the defendants herein will comply with the Order of the Court rendering the continuation of this action unnecessary. Should that application be granted, the issues sought to be litigated herein will be litigated in the State Court.

Accordingly, it is respectfully requested that this action be placed on the Suspense Calendar pending the resolution of the New York State Court proceedings.

Respectfully,

/s/ ML

ML:mi

cc: James I. Meyerson, Esq.
N.A.A.C.P.
Special Contribution Fund
1790 Broadway
New York, New York 10019

Respondent's Counsel's Letter to Judge Henry F. Werker

(Letter, dated February 17, 1978)

NAACP SPECIAL CONTRIBUTION FUND
1790 Broadway / New York, N. Y. 10019 / 245-2100

February 17, 1978

The Honorable Henry F. Werker
United States District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

RE: Carey vs Gaslight Club/77 Civ 4794

Dear Judge Werker:

Please be advised that the above-captioned and numbered matter was placed on the suspended calendar (as a consequence of a previous conference herein) because the matter was pending before the Court of Appeals of the State of New York.

The Court of Appeals did render a decision denying the Defendants herein the ability to prosecute a further appeal in this matter.

Thus, the Plaintiff herein has been successful in her state proceedings.

It would seem that the federal action could in all likelihood be dismissed. However, it is our considered opinion that, since we were compelled to file the Title VII action while the State proceeding was in process, we are entitled to some attorneys fees, if nothing else (assuming that the action is

Respondent's Counsel's Letter to Judge Henry F. Werker

otherwise dismissed but without committing my client to that position at this time).

I would suggest that this matter be scheduled for a conference before your honor in order to determine where the federal action will go. In the mean time, we will consult with the attorneys for the Defendants in order to be able to advise you our respective positions (some or all of which we may agree upon).

Thank you for your consideration and attention herein.

Sincerely yours,

/s/ James I. Meyerson
James I. Meyerson
Assistant General Counsel

Attorney for Plaintiff

JIM/

copy: Ms. Cidni Carey
Albert Proujansky, Esq.

Respondent's Counsel's Letter to Judge Henry F. Werker

(Letter, dated March 30, 1978)

March 30, 1978

The Honorable Henry Werker
United States District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: Carey vs. Gaslight Club, 77 Civ 4794

Dear Judge Werker:

At the conference convened in the above-captioned and numbered matter on Friday, March 17, 1978, you set a briefing schedule regarding the award of attorneys fees in this matter (in light of the Plaintiff's success in the New York State Division of Human Rights).

Said schedule set the submission of briefs for April 14, 1978. You did indicate that the Plaintiff should submit her brief by Friday, March 31, 1978.

Because of an overwhelming schedule the last two weeks, I have not been able to address myself to this matter. Accordingly, I would appreciate having until April 14, 1978 within which to submit. I have no objection to my adversary having two additional weeks therefrom within which to respond.

Thank you for your advisement and consideration herein.

Sincerely yours,

James I. Meyerson
Assistant General Counsel

Attorney for Plaintiff

JIM/sk
cc: Albert Proujansky, Esq.

Petitioner's Counsel's Letter to Judge Henry F. Werker

(Letter, dated June 4, 1978)

(Letterhead of Kane, Kessler, Proujansky, Preiss & Nurnberg, P.C.)

June 4, 1979

BY HAND

Hon. Henry F. Werker
United States District Judge
United States Courthouse
Foley Square, New York 10007

Re: Carey v. Gaslight Club, et al.
77 Civ. 4784

Honored Sir:

We are advised by counsel for the plaintiff that he received a call from your Chambers informing him that all papers which we feel appropriate to resolve the claim of attorneys' fees should be submitted to your office by June 6, 1979.

Counsel for the plaintiff and the undersigned have been conducting negotiations in an effort to resolve this matter. In the event that the matter cannot be resolved, we respectfully request that this matter be set down for a hearing, which we anticipate would not require more than one hour. The purpose of such hearing would be to permit us to establish that the beneficiary of this application is the NAACP Special Contribution Fund and that such Fund should not be entitled to recover more than they have ex-

pended in the form of compensation to the attorneys on their staff who rendered services to the plaintiff herein.

Thanking you for your consideration of this request, we are

Respectfully yours,

/s/ ALBERT N. PROUJANSKY

ANP:mmb
cc: James I. Meyerson, Esq.
NAACP Special Contribution Fund

Order of the Supreme Court of the United States Allowing Certiorari

Supreme Court of the United States

No. 79-192

—o—

NEW YORK GASLIGHT CLUB, INC., and JOHN ANDERSON, Manager of the New York Gaslight Club, Inc.,

Petitioners,

against

MS. CIDNI CAREY,

Respondent.

—o—

ORDER ALLOWING CERTIORARI. Filed October 9, 1979.

The petition for a writ of certiorari is granted.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-192

NEW YORK GASLIGHT CLUB, INC., and JOHN ANDERSON, Manager of the New York Gaslight Club, Inc.,

Petitioners,

VS.

MS. CIDNI CAREY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

NATHANIEL R. JONES, Esq.
CHARLES E. CARTER, Esq.
GEORGE E. HAIRSTON, Esq.
JAMES I. MEYERSON, Esq.
1790 Broadway—10th Floor
New York, New York 10019
(212) 245-2100

Attorneys for Respondent

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-192

NEW YORK GASLIGHT CLUB, INC., and JOHN ANDERSON, Manager of the New York Gaslight Club, Inc.,

Petitioners,

vs.

MS. CIDNI CAREY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari, seeking review of the Decision of the United States Court of Appeals for the Second Circuit (entered May 8, 1979). The Opinion has not yet been officially reported.

Question Presented

Did the United States Court of Appeals correctly hold that an aggrieved civil rights Plaintiff is entitled to recover attorney's fees under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. Section 2000(e) *et seq.*) for the successful prosecution of an employment discrimination matter in the New York State Division of Human Rights pursuant to the formal deferral of the

matter to said State Agency by the Equal Employment Opportunity Commission (under 42 U.S.C. Section 2000(e)-5(c)).[1]

Statement of Case

On or about August 27, 1974, the Respondent (Plaintiff-Appellant below), a Black American citizen, sought a waitress position with the Petitioner New York Gaslight Club, Inc. (Defendant-Appellee below). After auditioning and otherwise being interviewed, the Respondent was advised that there was no position available.[2]

Believing that she was denied a position as a waitress with the Petitioner Gaslight Club, Inc., because of her race, the Respondent filed a complaint with the New York District Office of Equal Employment Opportunity Commission (EEOC) on or about January 9, 1975.

On January 24, 1975, the EEOC advised the Respondent's attorney that a complaint, which said attorney had filed on behalf of the Respondent, had been received by the office and accepted.

On January 28, 1975, the New York State Division of Human Rights advised the Respondent that, pursuant to

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[1] The Circuit Court below posed the question in this form:

"The issue in this case . . . is whether the general policy of awarding attorney's fees to successful plaintiffs in Title VII actions envisions an award to a party who is successful in pursuing her claim before the state human rights agency without having to pursue her case in federal court. . . . The question is whether §706 (k) encompasses fee awards to complaining parties who succeed at a step in the statutory scheme before they are forced to litigate their claims in federal court."

See: Appendix to Petition for a Writ of Certiorari at page A4.

[2] The evidence of the same and as otherwise set forth is contained in an Affidavit to the District Court reproduced as Appendix "H" hereto at pages 35a-43a.

the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000(e)-5(c)), her complaint to the EEOC had been deferred to it. The Division directed the Respondent to file a complaint with its office within sixty (60) days.

On February 21, 1975, the Respondent filed a verified complaint with the New York State Division of Human Rights charging the Petitioners and Ray Angelic with discriminating against her by refusing to hire her because of her race (in substance the same charge which she brought against the Petitioners and Mr. Angelic in the EEOC).

After investigation, the New York State Division of Human Rights found probable cause to believe that the Petitioners had engaged in an unlawful discriminatory practice.

Conciliation efforts failed and the case was recommended for public hearing (pursuant to the Rules and Regulations of the New York State Division of Human Rights).

On May 20, 1975, Respondent's counsel wrote to the EEOC advising it that the Respondent was proceeding ahead in the State Division of Human Rights, per its deferral to said State agency, and inquiring of the status of the matter before the EEOC.

On May 22, 1975, the EEOC responded to the foregoing letter and indicated that, as soon as it was possible, an investigator would be assigned to the Respondent's matter and that she would be advised relative thereto.

Thereafter the matter came on for hearing before the New York State Division of Human Rights.

The Respondent was represented by James I. Meyerson, Esq., and George E. Hairston, Esq., attorneys on the staff

of the National Association for the Advancement of Colored People, who had been assisting the Respondent since prior to the commencement of the proceedings in the EEOC.

On August 13, 1976, the New York State Division of Human Rights held that the Petitioners had discriminated against the Respondent because of her race in violation of the Human Rights Law of the State of New York (See: Executive Law Sections 290 *et seq.*—18 McKinney's Sections 290, *et seq.*), although it concluded that Ray Angelic had not discriminated against the Respondent and dismissed the Complaint as to him.

The Division directed the Petitioners to offer to the Respondent a position as a waitress and to otherwise pay over to her a sum of money as a back pay award. No attorney's fee was awarded.[3]

On or about August 20, 1976, the Petitioners filed a Notice of Appeal from the afore-mentioned decision and Order to the New York State Human Rights Appeal Board, an agency independent of the New York State Division of Human Rights; and they secured a stay postponing implementation of the relief pending the outcome of the appeal therein.

On August 26, 1977, the New York State Human Rights Appeal Board affirmed the findings and determination of the Commissioner of the New York State Division of Human Rights.

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[3] The Human Rights Law of the State of New York does not provide for attorney's fees; and such fees have not been authorized. See: *State Division of Human Rights* v. *Gorton*, 302 N.Y.S. 2d 966, 32 A.D. 2d 933 (2nd Dept. 1969), *Motion to Dismiss Appeal denied* 306 N.Y.S. 2d 681, 25 N.Y. 2d 680 (1969). See also: *State Division of Human Rights on the Complaint of Luppino* v. *Speer*, 313 N.Y.S. 2d 28, 35 A.D. 107 (2nd Dept. 1970), *Reversed on other grounds* 324 N.Y.S. 2d 247, 29 N.Y. 2d 555 (1970).

Thereafter, the Petitioners appealed to the New York Supreme Court/Appellate Division-First Judicial Department, seeking to have the administrative determinations overturned, and obtained a stay temporarily postponing implementation of the relief, as ordered.

On November 3, 1977, said Court unanimously affirmed the administrative determinations. See: *New York Gaslight Club* v. *State Division of Human Rights on the Complaint of Carey*, 59 A.D. 2d 852 (1st Dept. 1977).

A subsequent Motion for reargument or in the alternative for leave to appeal to the New York State Court of Appeals was denied by the Appellate Division on January 10, 1978.

On February 14, 1978, the Court of Appeals of the State of New York denied the Petitioners leave to appeal thereto. See: *New York Gaslight Club, supra* at 43 N.Y. 2d 951 (1978).

From May 22, 1975 until on or about November 12, 1976, when counsel for the Respondent and a representative of the EEOC spoke over the telephone about the status of the proceedings in the State Division of Human Rights, there were no communications between the Respondent and the EEOC regarding the matter.

On or about November 13, 1976, Respondent's counsel forwarded to the EEOC copies of the brief and memoranda submitted by the various parties to the proceedings in the New York State Human Rights Appeal Board (which, at that time, were then pending upon appeal thereto by the Petitioners from the decision of the State Division in favor of the Respondent).

On July 13, 1977, the Respondent received a letter from the EEOC notifying her that it had decided not to litigate her matter and enclosing therein a Notice of Right to Sue Letter.

Thereafter and within the mandated ninety (90) day period, the Respondent filed a federal action (pursuant to both Title VII of the Civil Rights Act of 1964, as amended, and the Civil Rights Act of 1866, 42 U.S.C. Section 1981).

As far as known, no investigatory and/or conciliatory action was taken by the EEOC in this matter once the matter was initially deferred to the New York State Division of Human Rights, pursuant to 42 U.S.C. Section 2000 (e)-5(c).

While this matter was still pending in the New York State Courts (upon appeal thereto by the Petitioners from the administrative determinations adverse to their interest), the District Court convened a status conference.

The District Court was notified that the only issue which the Respondent anticipated litigating therein was the issue of whether or not the Respondent's attorney should be awarded attorney's fees for the success in the State Division of Human Rights (assuming that said success was maintained in the New York Courts, upon the efforts of the Petitioners to overturn the same, as it was anticipated), pursuant to the Title VII provisions authorizing the same. See: Letters attached hereto as Appendices "A", "B", "C", "D" and "E".

Ultimately, the Respondent's success in the New York State Division of Human Rights was upheld by the New York Court and the only issue, in fact, submitted to the District Court was whether the Respondent's counsel was entitled to an award of attorney's fees.

On July 27, 1978, the District Court issued an order dismissing the Complaint and otherwise marking the same off the Court calendar although the application for fees was still pending and submissions were subsequently made to

the Court relative to the same by counsel for both the Respondent and the Petitioners.

The District Court issued a decision on September 21, 1978 on the merits of the application for fees; See: *Carey* v. *New York Gaslight Club,* 458 F.Supp. 79 (S.D.N.Y. 1978), denying to Respondent's counsel attorney's fees, under Title VII, for the successes in the New York State proceedings, as described.[4]

Thereafter, on September 30, 1979, Respondent filed a timely Motion, seeking modification of the Memorandum Decision and leave to supplement the record.

The Petitioners filed papers in opposition to said Motion. In addition, Adele Graham, Esq., an attorney for the New York State Division of Human Rights, filed an affidavit in support of the Respondent's application, seeking to clarify the role of a Division attorney in the Division process. See: Appendix to Petition for Writ of Certiorari at pages A58-A61.

In said Affidavit, Ms. Graham set forth the policy, practice and role of the Division attorney within the State administrative proceedings; and she noted, categorically, that the Division encouraged complainants to obtain private counsel for the purposes of prosecuting their respective complaints in the State Division. Furthermore, Ms. Graham noted that the Respondent had obtained private counsel; and that, accordingly, the Division attorney did not participate in the administrative process.

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[4] Such action by the District Court must be considered to have been a reconsideration of its previous order of dismissal (to the extent, if any, that said dismissal raised problems relative to the issuance of the September order). Accordingly, the position articulated by the Petitioners in this regard is of little practical consequence herein; and this Court should not be concerned with the same in addressing the issue raised by this litigation.

Finally, Ms. Graham noted that, even where a Division attorney participates in the administrative proceedings and otherwise, the attorney acts for the Commissioner, upon the Complaint, and not for the Complainant.

On November 3, 1978, the District Court filed an Order, with notation, denying the Respondent's Motion (as described).

Believing that the District Court below was in error when it initially handed down its decision on September 21, 1978 and when it failed to modify the same, the Respondent filed a timely Notice of Appeal to the United States Court of Appeals for the Second Circuit.

On May 8, 1979, the United States Court of Appeals for the Second Circuit reversed the decision and order of the District Court and remanded the matter for consideration of an award of counsel fees (with Senior Circuit Judge Smith writing the majority opinion, in which Circuit Judge Mansfield joined and from which Circuit Judge Mulligan dissented).

Reasons for Denying the Writ

Respondent initially filed a formal complaint with the EEOC challenging the Petitioners' conduct under Title VII of Civil Rights Act of 1964, as amended.

Upon receipt of the same, the EEOC deferred the matter to the New York State Division of Human Rights (as it was required to do pursuant to Title VII of the Civil Rights Act of 1964); and said Commission held the complaint in suspension pending resolution in the State proceedings. See: *Love* v. *Pullman Co.*, 404 U.S. 522, 526, 92 S.Ct. 616, 30 L.Ed. 2d 679 (1972).

The Respondent then proceeded to utilize the State process in order to resolve her claim. As a consequence, the

EEOC was relieved of an administrative process at that time although it was not relieved of its legal obligation to the Respondent until it issued its July, 1977 Notice of Right to Sue Letter. Said letter was not issued until well after the New York State Division of Human Rights' proceedings had been completed, in full, and a favorable resolution secured by the Respondent (notwithstanding that the Commission could have issued said letter well in advance of the date on which it did so but elected not to do the same, thereby retaining its legal obligations pursuant to and under Title VII of the Civil Rights Act of 1964).

It is submitted, in light of the same, that the Respondent is entitled to attorney's fees for her successful prosecution of her EEOC complaint, a complaint which was, upon filing with the federal agency, deferred to the New York State Division of Human Rights for ultimate resolution.

In effect, the State proceeding was an extension of the federal proceeding and was envisioned by Congress to be a part of the entire federal statutory scheme.

That the state proceeding is part and parcel of the entire Title VII procedure is beyond question. See: *Harris* v. *Commonwealth of Pennsylvania,* 419 F.Supp. 10, 13 (M.D. Penn. 1976); *Plummer* v. *Chicago Journeyman Plumbers, etc.,* 452 F.Supp. 1127, 1136 (N.D. Ill. 1978); *Flesch* v. *Eastern Pennsylvania Psychiatric Institute,* 434 F.Supp. 963, 969 at footnote 3 (E.D. Penn. 1977); *Bell* v. *Wyeth Laboratories, Inc.,* 448 F.Supp. 133, 136 (E.D. Penn. 1978); *Equal Employment Opportunity Commission* v. *Delaware Trust Co.,* 416 F.Supp. 1040, 1044 (D.C. Del. 1976); *Presseisen* v. *Swarthmore College,* 386 F.Supp. 1337, 1340 (E.D. Penn. 1974); *Black Musicians of Pittsburgh* v. *Musicians Local 60-471,* 375 F.Supp. 902, 908-909 (W.D. Penn. 1974), *Affirmed without opinion* 544 F.2d 512 (3rd Cir. 1976);

Equal Employment Opportunity Commission v. *Wah Chang Albany Corp.*, 499 F.2d 187, 189 (9th Cir. 1974).[5]

In *Love* v. *Pullman Co., supra* at 404 U.S. 526, this Court found that, in furtherance of the purpose of Title VII of the Civil Rights Act of 1964 "to give state agencies a prior opportunity to consider discrimination complaints," it was not inappropriate for the Equal Employment Opportunity Commission to "hold a complaint in 'suspended animation'", pending the outcome of the state proceeding.

The reasons for Congress's inclusion of the State proceeding into the federal statutory scheme (where a state proceeding existed) were many fold, not the least of which was to ease the foreseeable case load which would descend upon the federal agency if it did not have a mechanism for deferring some of the potential case load to a competent state agency (without totally foreclosing its legal obligation and responsibility even in those situations).

It was obviously envisioned that matters deferred to the state agency (where appropriate) would result in the resolution of controversy either by way of conciliation or through a formal adjudicatory proceeding.

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[5] The Circuit Court below wrote in this regard:

"Deference to State mechanisms for resolving discrimination complaints is an integral part of the enforcement process under Title VII, 42 U.S.C. §2000e-5(c), and submission to state remedies is a jurisdictional prerequisite to EEOC action. See Equal Employment Opportunity Commission v. Union Bank, 408 F.2d 867, 869 (9th Cir. 1968). The Statutory framework of Title VII embodies a 'federal mandate of accommodation to state action.' Voutsis v. Union Carbide Corp., 452 F.2d 889, 892 (2nd Cir. 1971), cert. denied, 406 U.S. 918 (1972).

Thus, state human rights agencies play an important role in the enforcement process of Title VII, since they afford a chance to resolve a discrimination complaint in accordance with federal policy before such a complaint reaches the federal courts."

See: Appendix to Petition for Writ of Certiorari at pages A5-A8. See also: *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 39 L.Ed. 2d 147 (1974).

The instant case is a prime example of a deferral which, by way of formal resolution (as contrasted to a conciliatory resolution), permitted the EEOC to avoid addressing the entire controversy. See: Amicus Brief of the New York State Division of Human Rights to the Circuit Court below, in this regard, Appendix "F" hereto at pages 18a-19a.[6]

It is submitted that, by the mandated procedural deferral in this matter, the EEOC furthered the substantive purposes of Title VII of the Civil Rights Act of 1964 (to end discriminatory public and private employment policies, practices, and actions).

Thus, the Respondent is entitled to attorney's fees which, themselves, are designed to further the purposes of the Act. See: *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed. 2d 1263 (1968); *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed. 2d 280 (1975); *Lea* v. *Cone,* 438 F.2d 86 (4th Cir. 1971); *Evans* v. *Sheraton Park Hotel,* 503 F.2d 177 (Court of Appeals, D.C. 1974); *Parker* v. *Califano,* 561 F.2d 320 (Court of Appeals, D.C. 1977); *Johnson* v. *Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974); *Rios* v. *Enterprise Association Steamfitters Local 638 of U.A.,* 400 F.Supp. 993 (S.D.N.Y. 1975), *affirmed* 542 F.2d 579, 592-593 (2nd Cir. 1976), *cert. denied* 430 U.S. 911, 97 S.Ct. 1186, 51 L.Ed. 2d 588 (1977); *Mid-Hudson Legal Services, Inc.,* v. *G & U, Inc.,* 578 F.2d 34, 37 (2nd Cir. 1978). See also: Nussbaum, *Attorney's Fees in Public Interest Litigation,* 48 N.Y.U. L.Rev. 301, 321-322 (1973); Decision of the Circuit Court below in this regard (Appendix to Petition for

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[6] Addressing the 1978 Agreement between said agencies, the Division notes that:

". . . the 1978 Worksharing Agreement (Ex. B) 'in recognition of the common jurisdiction and goals, was intended to integrate the charge processing procedures and reduce duplication of effort by sharing primary responsibility' (Ex. B p.2)"

See: Appendix "F" hereto at page 19a.

Writ of Certiorari at page A5), citing *Mid-Hudson Legal Services, Inc., supra* at 578 F.2d 37 and *Johnson* v. *Georgia Highway Express, supra* at 488 F.2d 716.

To foreclose an award, in circumstances such as those reflected by the proceedings herein, would encourage persons to short circuit the deferral proceedings by seeking an EEOC Right to Sue Letter and, attendant thereto, litigating their claims in the federal courts, thus defeating the very purpose of the procedural requirement of deferral, to wit: "the promotion of dispute resolution through accommodation rather than litigation." See: *Weise* v. *Syracuse University,* 522 F.2d 397, 412 (2nd Cir. 1975). This is particularly so where it appears that an aggrieved person is likely to prevail in the state proceeding but without the potential for securing an attorney's fee award.

In effect, the Respondent herein would be penalized, without an award of fees, and otherwise foreclosed from securing complete Title VII relief because of the fact that, as a consequence of the Title VII deferral, she prevailed in said administrative proceeding.

Put another way, a Title VII defendant has no incentive to resolve the dispute in a state proceeding even after there has been a full scale evidentiary proceeding therein and the aggrieved party has prevailed. The position that there is nothing to lose (as there would be if attorney's fees could and would be awarded) undercuts conciliation and, at the bottom line, the mandate of Title VII as reflected by and through the deferral requirement.

Several courts, in similar (although not identical) circumstances, have awarded attorney's fees for the efforts incurred by a plaintiff in the administrative process where federal court action, relative to the substantive issue being controverted, has been obviated by the administrative proceedings and success therein.

Parker v. *Califano, supra* 561 F.2d 320 is particularly instructive. Addressing itself to whether the term "proceeding" as contained in Title VII "is broad enough to be properly construed to refer to either judicial or administrative proceedings", the Court held that it did and undertook an extensive analysis in support of its position, an analysis which the Circuit Court below referred to and adopted herein.

The *Parker* Court, relying on, among other authorities, *Newman* v. *Piggie Park Enterprises, supra* at 390 U.S. 400 and *Johnson* v. *Georgia Highway Express, Inc., supra* at 488 F. 2d 716, held that the award of attorney's fees encouraged the congressional policy designed to foster private enforcement of federal civil rights enactments and, ultimately, to secure broad compliance with the law.

Viewing the Supreme Court's emphasis of the "interrelatedness of Title VII's administrative and judicial enforcement scheme in the private sector", *Parker, supra* at 561 F.2d 331, citing *Alexander* v. *Gardner-Denver Co., supra* at 415 U.S. 47, the Court concluded "that in a Title VII suit, brought by a federal employee, attorney's fees awarded under Section 706(k) may include compensation for work done at both judicial and administrative levels". See: *Parker, supra* at 561 F.2d 324, noting that, "for a conscientious lawyer representing a federal employee in a Title VII claim, work done at the administrative level is an integral part of the work necessary at the judicial level." *Parker, supra* at 561 F.2d 333. See also: *Canty* v. *Olivarez,* 452 F.Supp. 762, 769 (N.D. Georgia 1978), citing *Parker* v. *Califano* with approval in this regard (again in the context of a federal administrative process); *Smith* v. *Califano,* 446 F.Supp. 530, 531 (D.C. D.C. 1978), citing *Parker, supra* and *Williams* v. *Boorstin,* 451 F.Supp. 1117, 1125-1126 (D.C. D.C. 1978); *Patton* v. *Andrus,* 459 F.Supp. 1189 (D.C. D.C.

1978); *Foster* v. *Boorstin,* 561 F.2d 340 (Court of Appeals, D.C. 1977); *Brown* v. *Bathke,* 588 F.2d 534, 638 (8th Cir. 1978); *McMullen* v. *Warner,* 416 F.Supp. 1163, 1167 (D.C. D.C. 1976).[7]

It is submitted that the fact that *Parker* addressed a federal employee and efforts in a federal administrative proceeding precedent to a Title VII district court proceeding (as contrasted to a state administrative proceeding by a private individual in the context of the private sector) should not have significant bearing on the application of the principles enunciated therein to the circumstances of the litigation herein (as the Circuit Court below so held. See: Appendix to Petition for Writ of Certiorari at page A9).

Thus, there is absolutely no basis for the position articulated by the Petitioners, citing the foregoing, that "the decision of the Court of Appeals is contrary to applicable federal law." See: Petition for a Writ of Certiorari at page 6. While there is no applicable federal case law *directly* in point, to the extent that there are analogous situations (as in *Fisher* v. *Adams,* 572 F.2d 406 (1st Cir. 1978), *Parker* v. *Califano, supra* at 561 F.2d 340, *Foster* v. *Boorstin, supra* at 561 F.2d 340), ". . . their reasoning supports a similarly favorable result." See: Opinion of Circuit Court below, Appendix to Petition for Certiorari at page A9.

In view of the foregoing Respondent submits that she should have been awarded attorney's fees by the District

[7] In Freedom of Information Act litigation, where "administrative" efforts were undertaken to secure information but said information was not forthcoming until after a lawsuit had been instituted, it has been held that attorney's fees are proper.
See: *Cuneo* v. *Rumsfield,* 553 F.2d 1360 (Court of Appeals, D.C. 1977). See also: *Nationwide Bldg. Maintenance, Inc.* v. *Sampson,* 559 F.2d 704 (Court of Appeals, D.C. 1977); *Vermont Low Income Advocacy Council* v. *Usery,* 546 F.2d 509 (2nd Cir. 1976).

Court as a consequence of her successful effort in the New York State Division of Human Rights and in light of the fact that said effort was an intricate part of the federal anti-employment discrimination enforcement scheme. The District Court, in effect, was being asked to assume final responsibility for the full and complete enforcement of Title VII (in the circumstances of this matter); and its refusal to do so, by and through the awarding of reasonable attorney's fees, was reversible error(as the Circuit Court below so held).

Notwithstanding that the Petitioner states "that Section 297(4)(a) of the New York Human Rights Law requires the Human Rights Division to present the complainant's case at the administrative level", See: Petition for Writ of Certiorari at page 10, such is not precisely the case; and the Circuit Court below so recognized the same in light of the position articulated by the New York State Division of Human Rights in an Amicus Brief to said Court (See: Appendix "F" hereto) and in the Affidavit of Adele Graham, an attorney for the Division, in the District Court (See: Appendix to Petition for a Writ of Certiorari at pages A58-A61). See: Opinion of the Circuit Court below, Appendix to Petition for Certiorari at pages A10-A12.

Moreover, the Petitioners' position that the New York State Law ". . . provides agency counsel at no expense to the complainant", See: Petition for Certiorari at page 6, is not accurate; nor is the fact that the "respondent's attorneys never requested, as permitted by Section 297(4)(a) of the New York Human Rights Law, the right to present the case solely on behalf of the complainant with the consent of the Division", See: Petition for Writ of Certiorari at page 10, of any significance (if it is accurate at all).

It is important to note that, at the investigative stage of the Division proceedings (after a complaint has been filed with the Division but before any sort of determination

is made), the Division attorney plays no role whatsoever. See: Amicus Brief, New York State Division of Human Rights (Appendix "F" hereto at page 17a), in this regard.

Such is significant since, at that stage, it is determined whether probable cause exists to go forward or whether the matter will be resolved summarily (in the form of a summary judgment type disposition—See: *Mitchell* v. *National Broadcasting Company,* 553 F.2d 265, 270-271 (2nd Cir. 1977)).

In the instant case, the Respondent's attorney appeared with her at the initial investigatory proceedings; and requested that certain information be produced. As a consequence, a probable cause finding was issued. Interestingly, approximately three years prior to that date, the Respondent, pro se, sought relief against the same Petitioners for discrimination (based on *sex*—as she charged); and a no probable cause finding was made. Thus, there is evidence that the presence of Respondent's counsel at the initial phase of this proceeding was very important, if not critical. See: Affidavit Upon Remand in support of Application for Fees, Appendix "G" hereto at page 24a.

Furthermore, as Ms. Graham points out in her Affidavit, See: Appendix to Petition for a Writ of Certiorari at page A59, the entire record before the State Division proceeding was made by the Respondent's counsel; and the Division attorney did not appear whatsoever, per the practice of the Division not to appear where private counsel is involved,[8]

[8] See: Amicus Brief of the New York State Division of Human Rights (Appendix "F" hereto at page 17a) where it is noted in this regard:

"At the hearing the Division attorney appears if the complainant has not retained private counsel; if the complainant has retained private counsel the Division attorney appears at the Division's option to protect the public interest."

in light of the overwhelming case load and the attendant policy to encourage private counsel to participate on behalf of complainants in Division proceedings. See: Affidavit of Adele Graham, Appendix to Petition for a Writ of Certiorari at page A59. See also: Amicus Brief, Appendix "F" hereto at page 17a.

It is submitted that the New York State Division of Human Rights attorney, while ostensibly representing the complainant in a Division proceeding, in fact represents the Commissioner of the New York State Division of Human Rights, upon the complaint, and not the complainant himself/herself. See: Affidavit of Adele Graham, Appendix to Petition for a Writ of Certiorari at pages A59-A60.

Thus, in a proceeding where the complainant does not prevail (by Commissioner's decision and order), the Division attorney cannot appeal the adverse decision, upon the complaint and for the complainant, because such would be inconsistent with the finding of the Commissioner whom the Division attorney, in fact, represents. See: Affidavit of Adele Graham, Appendix to Petition for a Writ of Certiorari at page A61.

Moreover, where the complainant secures only partial relief, upon prevailing, and seeks further relief in an appeal, the Division attorney will not represent the complainant in said effort since to do so would be inconsistent with the position of the Commissioner, whom said attorney represents upon the complaint of the charging party. See: Affidavit of Adele Graham, Appendix to Petition for a Writ of Certiorari at page A61.

Furthermore, where a party prevails before the Commissioner and an appeal is prosecuted by the non-prevailing party to the Appeal Board and the decision is reversed by the Appeal Board (against the complainant and the Com-

missioner), the Division attorney (who would appear before the Appeal Board to justify the decision of the Commissioner, upon the Complaint of the charging party) would not and cannot appeal the decision of the Appeal Board to the Courts of the State of New York.

It is apparent, therefore, that the Division attorney does not represent the complainant (charging party) but rather represents the Commissioner, upon the complaint of the charging party.

It is apparent, as well, that, in the instant case, the Division attorney represented the Commissioner and not the Respondent. Thus, as they did before the District and Circuit Courts below, so to herein Counsel

> "... for Gaslight has misstated ... the obligation of the Division to provide representation to the complainant at any stage of the proceedings before it. Likewise Judge Werker's holding that 'The plaintiff had the option of pursuing her state administrative remedies without incurring any expenses at all for legal service' inadvertently overstated and misconstrued the Human Rights Law, the Division's Rules, and its actual practices."

See: Amicus Brief, New York State Division of Human Rights, Appendix "F" hereto at page 18a. See also: Decision of the Circuit Court below at footnote 9 (Appendix to Petition at pages A11-A12) where the Court addressed these propositions, in depth.[9]

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[9] To the extent that the Respondent secured "private" counsel, it is inconsequential that said counsel was, in fact, an employee of a public interest organization for attorney's fees purposes. See: Footnote 1 of the Decision of the Circuit Court below (Appendix to Petition for a Writ of Certiorari at pages A3-A4); *Reynolds* v. *Coomey*, 567 F.2d 1166, 1167 (1st Cir. 1978); *Rios* v. *Enterprise Association Steamfitters Local 638 of U.A.*, *supra* at 400 F.Supp. 996.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

NATHANIEL R. JONES, Esq.
CHARLES E. CARTER, Esq.
GEORGE E. HAIRSTON, Esq.
JAMES I. MEYERSON, Esq.
N.A.A.C.P.—1790 Broadway
New York, New York 10019
(212) 245-2100

Attorneys for Respondent

By: .....

Of Counsel:

JAMES I. MEYERSON, Esq.

Certificate of Service

James I. Meyerson, Esq., one of the attorneys for the Respondent herein, certifies that on the 30th day of August, 1979, I served three copies of the foregoing Brief in Opposition upon the attorneys for the Petitioners by mailing the same, postage prepaid, first class, as follows: Marvin Luboff, Esq., Kane, Kessler, Proujansky, Preiss & Nurnberg, P.C., 680 Fifth Avenue, New York, New York 10019.

Respectfully submitted

James I. Meyerson, Esq.
N.A.A.C.P.—1790 Broadway
New York, New York 10019
(212) 245-2100

Attorney for Respondent

By: .....

Appendices

Appendix A

(Letter, dated February 7, 1978)

LAW OFFICES
KANE, KESSLER, PROUJANSKY, PREISS & PERMUTT, P.C.

SIDNEY S. KESSLER
ALBERT N. PROUJANSKY
EDMUND PREISS
MARVIN LUBOFF
JEFFREY S. TULLMAN
MARTIN J. FRIEDMAN

NEAL A. PERMUTT

680 FIFTH AVENUE
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(212) 541-6222

THOMAS A. KANE
HERBERT RAND
COUNSEL
SAMUEL T. PERMUTT
(1940-1975)

February 7, 1978

Hon. Henry F. Werker
United States District Judge
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

RE: CAREY v. NEW YORK GASLIGHT CLUB, INC., et ano, 77 Civ. 4794 (HFW)

Dear Judge Werker:

After discussion with your Law Clerk at the pretrial conference on February 3, 1978, and thereafter discussion with counsel for the N.A.A.C.P. who concurs in this application, we request that the above-entitled action be placed on the Suspense Calendar pending the determination of a motion, at present pending before the New York State

Appendix A

Court of Appeals, which will be dispositive of most if not all of the issues in this lawsuit.

The plaintiff in this action has been awarded the relief sought herein in New York State Administrative and Court proceedings. The defendants herein have applied to the New York State Court of Appeals for permission to appeal from the affirmance by the Appellate Division of the findings of the New York State Division of Human Rights. Should that application be denied, the defendants herein will comply with the Order of the Court rendering the continuation of this action unnecessary. Should that application be granted, the issues sought to be litigated herein will be litigated in the State Court.

Accordingly, it is respectfully requested that this action be placed on the Suspense Calendar pending the resolution of the New York State Court proceedings.

Respectfully,

/s/ ML

ML:mi

cc: James I. Meyerson, Esq.
N.A.A.C.P.
Special Contribution Fund
1790 Broadway
New York, New York 10019

Appendix B

(Letter, dated February 17, 1978)

NAACP SPECIAL CONTRIBUTION FUND
1790 Broadway / New York, N. Y. 10019 / 245-2100

February 17, 1978

The Honorable Henry F. Werker
United States District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

RE: Carey vs Gaslight Club/77 Civ 4794

Dear Judge Werker:

Please be advised that the above-captioned and numbered matter was placed on the suspended calendar (as a consequence of a previous conference herein) because the matter was pending before the Court of Appeals of the State of New York.

The Court of Appeals did render a decision denying the Defendants herein the ability to prosecute a further appeal in this matter.

Thus, the Plaintiff herein has been successful in her state proceedings.

It would seem that the federal action could in all likelihood be dismissed. However, it is our considered opinion that, since we were compelled to file the Title VII action while the State proceeding was in process, we are entitled to some attorneys fees, if nothing else (assuming that the action is

Appendix B

otherwise dismissed but without committing my client to that position at this time).

I would suggest that this matter be scheduled for a conference before your honor in order to determine where the federal action will go. In the mean time, we will consult with the attorneys for the Defendants in order to be able to advise you our respective positions (some or all of which we may agree upon).

Thank you for your consideration and attention herein.

Sincerely yours,

/s/ JAMES I. MEYERSON
JAMES I. MEYERSON
Assistant General Counsel

Attorney for Plaintiff

JIM/

copy: Ms. Cidni Carey
Albert Proujansky, Esq.

Appendix C

(Letter, dated March 20, 1978)

Albert Proujansky, Esq.
Kane, Kessler, Proujansky,
Preiss & Permutt
680 Fifth Avenue
New York, New York 10019

Re: Carey vs. Gaslight Club

Dear Mr. Proujansky:

Per our telephone conversation on Friday, March 17, 1978, please be advised that I did appear in Court relative to the federal matter now pending herein; and that Judge Werker gave us one month within which to submit a brief in support of attorneys fees. He did advise us that the Plaintiff should submit her brief within two weeks; and that you would have two weeks within which to respond.

I am hopeful that I will be able to meet said schedule; but I am not entirely sure that I will be able to do so. However, I shall notify both you and the Court in this respect, if I am not able to do so.

I did advise the Court, as well, that I was hopeful that, at least as to the monetary judgment in the state proceeding, we would be able to work something out by the time of submission (on attorneys fees); and that, if we were able to do so, we would be able to, in all likelihood, dismiss the federal action save for the determination on the attorneys fees.

I did advise you, as well, in our telephone conversation that your associate, who did appear in your stead, advised me after we left the judges chambers (and without making

one iota of reference to the same during our rather lengthy conversation prior to appearing before the Court) that he had been informed by you to advise me that you had been informed that my client had, in effect, advised some persons in the Club that there were not enough Black waitresses in the Club and that she would "shut the Club down." He further advised me that you instructed him to state that, if she did not stop with such talk (I believe your associate utilized the word "politicing"), to quote your associate "we will run her out of the Club."

I advised you that I did not expect for you to convey these messages through your associates but directly to me (in view of the history of this litigation).

I also advised you that I considered the statement a threat.

You denied, that it was a threat but a warning. You also advised me that, if there had been substance to the assertion, you would have brought her up on formal charges.

Since apparently there was no substance thereto to bring her up on formal charges, I do not believe that there was substance for you to warn her.

I might point out to you that I consider a warning a threat; and I consider the warning (threat) herein totally unjustified.

As I indicated to you on the telephone, I did not believe that my client would, in fact, threaten to "close your Club." I did indicate to you that I would not be surprised if my client had indicated to persons that there were not enough Black waitresses in the Club (although I had not spoken with her in that regard but only to the extent that was) outlined in a letter to you which you had not received as of our conversation and which set forth therein a conversation which Ms. Carey had with a waitress representative

of the union and also the Manager of the Club). I, myself, do not believe that there are enough Black waitresses in your Club (and I indicated the same to you in our conversation).

I have since spoken with Ms. Carey. She did advise me in our telephone conversation that she never threatened to close the Club down.

She indicated to me that, in light of her conversation on Wednesday, (as outlined in my last correspondence to you), she appeared in the Club on Thursday and advised some waitresses that she really just wanted to do her job and she really did not want to ferment discomfort in the Club. She did advise the persons with whom she was speaking that the Club might eventually have more Black waitresses and that in fact others might not have their jobs (a natural thing in time). She did not threaten to close the Club; and we believe that there is at least one individual who would so testify.

She did indicate to me in our recent conversation that she learned that a waitress did advise one of the customers in the Club that she believed that she was going to be laid off because of the hiring of Ms. Carey (and referenced that assertion to race). While Ms. Carey did not hear the conversation, she was advised of the same.

In addition, Ms. Carey has since learned that she believes that a Petition will be circulated by waitresses in the Club to the effect that those waitresses do not believe that she (Ms. Carey) is the Gaslight Club type, whatever that means.

Let me again reiterate that I do not believe that there was any basis whatsoever for the warning/threat or whatever you want to call it.

Appendix C

While you are the attorney for the Gaslight Club and one who very strongly disagrees with both the determination and nature of the relief accorded herein (that advisement being told to me by you in several conversations), you are also a Director of that Club.

I do not know how to gage when you are acting as an attorney and when you are acting as a Director; but I will tell you categorically that, if retaliation charges and/or harassment charges need to be brought in this situation (and I am not stating that they will—merely projecting), I am hopeful that I will not have to include you as a Director. There is definitely a potential conflict.

You asked me on Friday why I did not take this matter up with the Union. I have no quarrel with the Union (nor do I hope that I have a quarrel any further with your Club). I would hope that as a Director of the Club and the attorney therefor you would undertake to deal with this problem forcefully.

I note that the Union has not yet gone out on a picket as you envisioned it might. Perhaps it is because you laid off the only other Black waitress whom I understand you have working for you. Per our conversation on Friday and your advisement of the same, I must confess that I am deeply distressed about the same notwithstanding your explanation of last hired/first fired (seniority).

In light of the order under which the Club is now operating it would seem to me that there is serious questions about your lay off of said Black individual.

I must tell you, in all honesty (as I try to be), that I am deeply concerned about your enforcement efforts and your desire to ameliorate tensions rather than to exacerbate the same.

Appendix C

Let me state again, we desire no problems. I understand that Ms. Carey worked the floor on Friday, March 17, 1978, and did quite well with the five or six tables. In fact, I understand her tips were somewhat larger than a regular and that the regular expressed some irritation with the same.

In any event, I understand there were no problems and we are glad of the same.

I do understand that Ms. Carey did see you on Friday and there was a greeting without more.

Ms. Carey advises that she is working three days this week (rather than the normal four) because it is holy week and will apparently be slow. She has no objection to the same (although she is somewhat disappointed since she needs the income); but she does understand that next week she will be given a full four day schedule.

I shall be back in touch with you respecting the settlement (hopefully) of the monetary judgment. I have been speaking with my client in this regard and we will have something to submit to you in within the next several days.

Thank you for your complete understanding and consideration herein.

Sincerely yours,

James I. Meyerson
Assistant General Counsel

Attorney for Complainant

JIM/sk
e
cc: Ms. Cidni Carey

Appendix D

(Letter, dated March 30, 1978)

March 30, 1978

The Honorable Henry Werker
United States District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: Carey vs. Gaslight Club, 77 Civ 4794

Dear Judge Werker:

At the conference convened in the above-captioned and numbered matter on Friday, March 17, 1978, you set a briefing schedule regarding the award of attorneys fees in this matter (in light of the Plaintiff's success in the New York State Division of Human Rights).

Said schedule set the submission of briefs for April 14, 1978. You did indicate that the Plaintiff should submit her brief by Friday, March 31, 1978.

Because of an overwhelming schedule the last two weeks, I have not been able to address myself to this matter. Accordingly, I would appreciate having until April 14, 1978 within which to submit. I have no objection to my adversary having two additional weeks therefrom within which to respond.

Thank you for your advisement and consideration herein.

Sincerely yours,

James I. Meyerson
Assistant General Counsel

Attorney for Plaintiff

JIM/sk
cc: Albert Proujansky, Esq.

Appendix E

(Letter, dated June 4, 1978)

(Letterhead of Kane, Kessler, Proujansky, Preiss & Nurnberg, P.C.)

June 4, 1979

By Hand

Hon. Henry F. Werker
United States District Judge
United States Courthouse
Foley Square, New York 10007

Re: Carey v. Gaslight Club, et al.
77 Civ. 4784

Honored Sir:

We are advised by counsel for the plaintiff that he received a call from your Chambers informing him that all papers which we feel appropriate to resolve the claim of attorneys' fees should be submitted to your office by June 6, 1979.

Counsel for the plaintiff and the undersigned have been conducting negotiations in an effort to resolve this matter. In the event that the matter cannot be resolved, we respectfully request that this matter be set down for a hearing, which we anticipate would not require more than one hour. The purpose of such hearing would be to permit us to establish that the beneficiary of this application is the NAACP Special Contribution Fund and that such Fund should not be entitled to recover more than they have ex-

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pended in the form of compensation to the attorneys on their staff who rendered services to the plaintiff herein.

Thanking you for your consideration of this request, we are

Respectfully yours,

/s/ Albert N. Proujansky

ANP:mmb
cc: James I. Meyerson, Esq.
NAACP Special Contribution Fund

Appendix F

(Brief of New York State Division of Human Rights/Amicus Curiae)

In the
UNITED STATES COURT OF APPEALS
For the Second Circuit

Ms. Cidni Carey,
Plaintiff-Appellant,

vs.

New York Gaslight Club, Inc., and John Anderson,
Manager of the New York Gaslight Club, Inc.,
Defendants-Appellees.

APPEAL FROM MEMORANDUM AND DECISION
(AND SUBSEQUENT ORDER RELATIVE THERETO)
OF THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE STATE DIVISION OF HUMAN RIGHTS

Statement of Interest

The New York State Division of Human Rights (hereinafter "the Division") is the nation's oldest fair employment practices commission. It was created in 1945 in exercise of the State's police power for the protection of the public welfare, health and peace of the people of the State of New York, and in fulfillment of the provisions of the Constitution of this State concerning civil rights.

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The Division has developed procedures for carrying out its functions under the law, to eliminate unlawful discriminatory practices. It is the argument of the Division that the District Court erroneously interpreted the Human Rights Law and the Division's procedures thereunder. The interest of the Division herein is that the Court has before it an accurate account of the law, the Division's rules, and the actual facts of practice, with which the parties to this action are not necessarily knowledgeable.

Statement of the Background in the State Division of Human Rights

In January 1975, Appellant (hereinafter Carey) filed a complaint with the Federal Equal Employment Opportunity Commission (hereinafter EEOC) charging Appellee New York Gaslight Club, Inc. (hereinafter Gaslight) with an unlawful employment practice. Pursuant to Section 706 of Title VII of the Civil Rights Act of 1964 and to a contract with the Division the EEOC deferred the charge to the Division. The Division proceeded to act upon the charge pursuant to Section 297 of the New York State Human Rights Law, N.Y. Executive Law Art. 15 (McKinney's Vol. 18), by investigation, finding and determination of probable cause, and public hearing. An order favorable to Carey was issued after hearing, which, upon appeal, HRL Sections 297-a and 298, was affirmed by the State Human Rights Appeal Board and the Appellate Division of the Supreme Court. *N.Y. Gaslight Club* v. *S.D.H.R.*, 59 A.D.2d 852 (1st Dept. 1977). Leave to appeal was denied by the New York Court of Appeals. 43 N.Y.2d 951 (1978). Counsel fees to Carey's attorney, who participated at all stages of the proceeding from investigation through final

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appeal, were not awarded. See *S.D.H.R.* v. *Gorton*, 32 A.D.2d 933 (2nd Dept. 1969); mot. to dis. app. den. 25 N.Y.2d 680 (1969).

Carey, having previously obtained a right to sue letter from the EEOC, then filed an action in the Southern District Court to recover counsel fees. This action was dismissed by Judge Werker, in a decision which discusses the State Human Rights Law.

ARGUMENT

I. The Law, Rules, and Practice of the State Division of Human Rights Reveal a Fundamental Distinction Between the Roles of Private Counsel for the Complainants and the Role of the Division Attorney.

Section 297 of the Human Rights Law sets forth the procedure to be followed in processing a complaint under the law. Subdivision 1 provides for the filing of a complaint which may be filed by an individual "or his attorney-at-law." Subdivision 2 provides for the investigation of the complaint; subdivision 3 provides for conciliation, and subdivision 4 provides the procedures for public hearing. Section 297-a establishes the State Human Rights Appeal Board, which, in subdivision 6, has the power "to hear appeals by any party to any proceeding before the Division from all orders of the Commissioner * * *." Section 298 provides for judicial review and enforcement in the Appellate Division of the New York Supreme Court. These various sections contain references to the Division attorney only as follows:

> "The case in support of the complaint shall be presented by one of the attorneys or agents of the division and,

at the option of the complainant, by his attorney. With the consent of the division, the case in support of the complainant may be presented solely by his attorney." HRL § 297.4.a.

"The Division may appear in court by one of its attorneys." HRL § 298.

The provision obviates appearances by the Attorney General of the State of New York on behalf of the Division. See N.Y. Executive Law, Section 63.

Section 295 of the Human Rights Law, listing the general powers and duties of the Division, includes in subdivision 5 thereof the power "[T]o adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of this article, and the policies and practice of the division in connection therewith."

Rules were duly promulgated pursuant to this power, and were duly filed with the New York Secretary of State for publication in the Official Compilation of Codes, Rules and Regulations of the State of New York, equivalent to the Code of Federal Regulations, and which has the force and effect of law. 9 N.Y.C.R.R. § 465 et seq.) volume A-1; CCH Employment Practice Guide § 26075, pp. 8910 et seq.

Rule 456.6 refers to the investigation of a complaint (pursuant to Section 297.2 of the Law) by "the Regional Director . . . with the assistance of staff." Conciliation under Rule 465.7 is also left to the Regional Director. Rule 465.11 covers representation by an attorney. Subdivisions (d) and (e) are pertinent herein and are attached hereto for the Court's convenience. These sections reveal that dual representation by the Division attorney and a private attorney representing the complainant is not contemplated except in the unusual case and at the Division's option.

This rule, a 1977 codification of an existing procedure, was designed for two purposes: (1) conservation of the Division attorneys' time in a period of exceptionally heavy case loads and backlogs and (2) clarification of the role of the Division attorney vis-a-vis the complainant. The rules, carrying out the statutory mandate, and the actual procedures of the Division, work in actual practice as follows:

When a complaint is filed and investigated, the Division attorney does not appear except upon a special request made by the Regional Director for the purpose of representing and advising the Regional Director.

The Division is however aware that private counsel frequently represent complainants during this stage leading to a finding of probable cause or dismissal for no probable cause. Section 297.2. The finding of probable cause after investigation is a necessary preliminary to the public hearing stage. However, at no time is a complainant represented by a Division attorney at the investigation level.*

At the hearing the Division attorney appears if the complainant has not retained private counsel; if the complainant has retained private counsel the Division attorney appears at the Division's option to protect the public interest.

At the appellate level, the Division attorney appears to support the Division's order and to seek enforcement thereof pursuant to § 298. Here, the Division attorney represents only the Commissioner and the Division. The Division attorneys *can not* represent a complainant on appeal from an order of the Commissioner adverse to the com-

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* There is an exception to this procedure when the Division itself, pursuant to its authority under § 297.1, makes a complaint on its own motion. An attorney may be assigned to draft the complaint and to advise the regional staff in the investigation.

plainant. Nor can the Division attorney represent a complainant whose favorable order after hearing has been reversed by the Appeal Board. Such a situation recently occurred in the case of *Cox* v. *Dept. of Correctional Services,* 61 A.D.2d 25 (4th Dist. 1978). The Division cannot appeal from an order of the State Human Rights Appeal Board. *SDHR* v. *Niagara Mohawk—Power Corp.,* —— A.D.2d —— (4th Dept. 9-15-78) mot. for lv. to app. den. —— N.Y.2d —— (N.Y.L.J. 12-4-78, P. 7 col. 2).

Counsel for Gaslight has misstated, in its brief at 21-23, the obligation of the Division to provide representation to the complainant at any stage of the proceedings before it. Likewise Judge Werker's holding that "The plaintiff had the option of pursuing her state administrative remedies without incurring any expenses at all for legal services" inadvertently overstated and misconstrued the Human Rights Law, the Division's Rules, and its actual practices.

II. The Federal and State Agencies Function in an Integrated Scheme to Enforce the Public Policy of Combatting Discrimination.

The State Division of Human Rights is an official "706 Deferral Agency", under the provisions of the EEOC Rules and Regulations. 29 C.F.R. Part 1601, Section 1601.13. It stands in a contractual relationship with the Federal government under which moneys are received for the processing of those cases which fall within the jurisdiction of both agencies. Thus the State agency has a role, defined by Title VII of the Civil Rights Act of 1964 and refined by its contractual obligations, as seen in Exhibits A, B and C attached to the affidavit of Adele Graham accompanying

the motion for leave to file as amicus curiae, of a participant in an integrated Federal-State scheme.

Filing of a Division complaint is a condition precedent to filing a charge with the EEOC. The Division's jurisdiction is exclusively only for the first 60 days after the complaint is filed. Under the system called "dual filing," a complaint filed with the Division is deemed filed with the EEOC 60 days later, and a charge filed with the EEOC is deemed filed with the Division immediately. The statement of Gaslight in its brief at p. 10 is therefore erroneous. At the time the Carey complaint was filed in 1975, the procedure was otherwise; that is, complaints were originally filed with the EEOC which then literally deferred them by notifying the State agency of the filing of the charge. The State agency was then required to notify the charging party of the necessity to come in to the State agency to file a complaint. Thus the 1975 contract (Ex. C) refers to the resolution by the State of "jointly filed charges" "consistent with an ongoing cooperative effort" and "an efficient division of work between said District office and the contractor."

Likewise the 1978 Worksharing Agreement (Ex. B) "in recognition of the common jurisdiction and goals", was intended to "integrate the charge processing procedures and reduce duplication of effort by sharing primary responsibility * * *" (Ex. B p. 2)

Furthermore, the Memorandum of Understanding of June 8, 1976 (Ex. A) (an earlier version of the Worksharing Agreement) states:

> "In recognition of the common jurisdiction and goals of the two agencies and to provide an efficient procedure whereby individuals may invoke the full panoply of procedures and remedies available under the

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relevant state and federal laws, and Division and the Commission have endeavored to inform complainants/charging parties of their rights under both state and federal law, and have encouraged and assisted such individuals in filing with the other agency."

CONCLUSION

THE ROLE OF PRIVATE COUNSEL TO A COMPLAINANT UNDER THE HUMAN RIGHTS LAW IS DISTINGUISHABLE FROM THE ROLE OF AN ATTORNEY EMPLOYED BY THE STATE DIVISION OF HUMAN RIGHTS.

Respectfully submitted,

ANN THACHER ANDERSON,
General Counsel
Attorney for Amicus Curiae
State Division of Human Rights

By /s/ ADELE GRAHAM
ADELE GRAHAM
2 World Trade Center
New York, N. Y. 10047
(212) 488-5365

Appendix G

(Affidavit Upon Remand in Support of Application for Fees)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil No. 77 Civ 4784 (HFW)

MS. CIDNI CAREY,

Plaintiff,

VS.

NEW YORK GASLIGHT CLUB, INC., et al.,

Defendants.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

James I. Meyerson, being first duly sworn, deposes and says:

1. I am one of the attorneys for the Plaintiff herein; and I execute this Affidavit in that capacity.

2. I have been primarily responsible for the preparation and prosecution of all phases of this litigation, on behalf of the Plaintiff, including those efforts which transpired in the New York State Division of Human Rights and thereafter before the New York State Division of Human Rights Appeal Board and the New York State Courts.

3. In response to the June 4, 1979 letter to this Court from the attorneys for the Defendants herein (a copy of which is attached hereto), the following should be noted:

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a. Upon receipt of a copy of said letter, I did inquiry as to the policy of the National Association for the Advancement of Colored People, Special Contribution Fund, Inc. relative to the award of fees secured by an attorney in the employ of said Special Contribution Fund, Inc. who undertakes to represent a person or persons in civil rights oriented litigation addressing itself to racial discrimination.

b. I was advised that the policy is that fees are made payable to the attorney since the Special Contribution Fund, Inc. is not authorized to practice law and does not practice law (nor is the Special Contribution Fund, Inc. designated as an organization whose function and purpose is in the nature of a law office).

c. I was advised that said fees are to be paid to the attorney or attorneys responsible for the litigation; and said attorney is then responsible for the payment over to the Special Contribution Fund, Inc. those costs expended in the prosecution of the litigation by said Special Contribution Fund, Inc. as well as a proportionate sum representing the hours spent by said attorney in the prosecution of the matter (pro-rated according to the yearly salary received by said attorney and the number of hours of work by the attorney during the course of employment during which the litigation was on-going).

d. Said policy is basically the same policy under which I previously received attorney fees as a consequence of my efforts in preparing and prosecuting the case encaptioned *Hart* v. *Community School Board*, 512 F. 2d 37 (2nd Cir. 1975), a successful school desegregation matter involving the City School District of the City of New York.

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e. Any fees left after reimbursement to the Association, Special Contribution Fund, Inc. (per the formula described heretofore) are left to the attorney to whom said fee is paid initially for use by said attorney in his/her discretion.

4. In order to properly document my efforts herein, I offer the following summary thereof, based on a review of my files:

a. The Plaintiff herein, Ms. Cidni Carey first sought my assistance in January, 1975. At that time I was employed in the office of the General Counsel of the N.A.A.C.P. Special Contribution Fund, Inc., as a full time staff attorney (with the title of Assistant General Counsel). I had been so employed in said capacity since October 15, 1970.

b. As I recall the same, Ms. Carey was specifically referred to me by name as a consequence of having spoken to a news reporter who gave her my name.

c. I spent several hours with Ms. Carey during our initial meeting on or about January 8, 1979.

d. During that period of time, Ms. Carey related certain facts to me about her efforts to secure a position in the New York Gaslight Club, Inc. during the previous August (1974). Ms. Carey related to me that approximately four (4) years prior to her August effort she had attempted to secure a position with the New York Gaslight Club, Inc. but

that she had been turned down as a consequence thereof.

e. Ms. Carey indicated to me that, at that time, she did file a Complaint with the New York State Division of Human Rights alleging that she had been discriminated against because of her *sex;* but that, after an investigative conference (where she appeared without counsel), the New York State Division of Human Rights did issue a non probable cause finding on her complaint (dismissing the same).

f. After discussing the matter with Ms. Carey, in depth, I did undertake to draw up a complaint against the New York Gaslight Club, Inc. and others. I drew up the Complaint at the time Ms. Carey first appeared in my office; and, after reading through the same, Ms. Carey did sign it and document was notarized.

g. Said Complaint was filed, per the caption thereof, with the Equal Employment Opportunity Commission. I did forward the original and two copies of the same with a cover letter, on behalf of my client.

h. Thereafter, Ms. Carey did receive a notice from the Equal Employment Opportunity Commission to proceed to the New York State Division of Human Rights (under deferral) for the purposes of filing a Complaint (based on the allegations contained in her Complaint, as I had drawn the same, filed with the Equal Employment Opportunity Commission).

i. I did consult with Ms. Carey about the same; and, thereafter, Ms. Carey did proceed to an office of the

State Division of Human Rights to file the appropriate Complaint (on a form provided by the New York State Division of Human Rights). Said Complaint was filed on February 21, 1975 shortly after Ms. Carey received the afore-mentioned Notice from the Equal Employment Opportunity Commission and shortly after Ms. Carey consulted with me in this regard.

j. Thereafter, I did receive a Notice of conference from one Mr. Courtney Brown, Regional Director of the Office of the New York State Division of Human Rights, State Office Building, 125th Street, New York, New York. I received said Notice from Mr. Brown on or about March 11, 1975 and did advise my client of the same. Said conference was scheduled for March 21, 1975 at 3:00 P.M.

k. Thereafter, I did consult with my client and I did appear with her at the conference on March 21, 1975.

l. I did receive communications and otherwise undertake communications with the attorney for the Defendants; and I did correspond and communicate with Mr. Courtney Brown (subsequent to the aforestated conference).

m. Efforts at conciliation of the matter were taken subsequent to the conference, with the Plaintiff attempting to secure the position which she felt had been denied to her because of her race. They failed; and at the end of May, 1975, the New York State Division of Human Rights did issue a Probable

Cause letter directing that the matter be set for public hearing.

n. Thereafter, at the end of June, 1975 (more precisely June 23, 1975), I did write to the New York State Division of Human Rights seeking to have the matter set for hearing since I had not yet received notice of a date of hearing (the notice of probable cause having been issued at the end of May, 1975).

o. Ultimately a hearing was scheduled before Norman Mednick, Hearing Examiner, New York State Division of Human Rights. Communication with the Division of Human Rights advised me that, since I was appearing for the Complainant therein, the Division would not appear at the proceedings (by an attorney) although said attorney was available for consultation.

p. I did consult with Mr. Terry Myers, an attorney with the New York State Division of Human Rights, relative to the issuance of subpoenas to require the Gaslight Club to produce documents, witnesses, etc. at the hearing, as said hearing was scheduled for September 22, 1975.

q. Because of a previous engagement which I had on said date and because of the desire to proceed ahead with the hearing, I requested that my associate, George Hairston, appear on the initial hearing date; and he did so. In that regard, I did communicate with my client and with Mr. Hairston; and I did meet with both in preparation for said hearing.

r. Said hearing was held on September 22, 1975.

s. Thereafter, said hearing was adjourned to January 15, 1976 at which time I did appear to conclude the hearing.

t. In the interim, I did consult with my client and otherwise correspond with the attorney for the Defendants and with the New York State Division of Human Rights.

u. I did obtain a copy of the September 22, 1975 hearing transcript; and, subsequent to the conclusion of the January, 1976 proceeding, I did obtain a copy of the transcript of said proceeding.

v. Thereafter, in February, 1976, I did submit a Brief in support of my client's position to the Hearing Examiner for his use in the decision in this matter. At this stage I did not believe that the New York State Division of Human Rights did, in fact, submit a post hearing memorandum.

w. Thereafter, in April, 1976, I did write to the New York State Division of Human Rights urging a decision since it had been almost two months since submission and since the hearing and record thereof was short.

x. Thereafter, in July, 1976, I did write to the New York State Division of Human Rights seeking a copy of the Hearing Examiner's recommendations to the Commissioner; and I did receive a copy of the same in which it appeared that said Hearing Examiner proposed to recommend a favorable decision.

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y. On August 13, 1976, the Commissioner of the New York State Division of Human Rights did hand down a decision in favor of the Plaintiff, finding that the New York Gaslight Club, Inc. was in violation of the Human Rights Law of the State of New York and directing that said Gaslight Club provide the Plaintiff with a position and compensate her in terms of back pay according to a formula set forth by the Commissioner in his opinion.

z. Thereafter, the Defendants did file a Notice of Appeal to the New York State Division of Human Rights Appeal Board and did seek a stay of the Order (both with respect to back pay and with respect to placing the Plaintiff in a position). I did prepare an Affidavit in Opposition to the Motion for a Stay; but said Application was granted in August, 1976.

aa. In October, 1976, I did draw up an Application for the Modification of the Stay previously issued in this matter by the Appeal Board. Such was necessitated by a change in circumstance of my client, with respect to employment, and the delay in setting this matter for hearing. Said Modification was opposed and denied.

bb. It should be noted that with respect to both the Opposition to the initial application for the stay (from the Appeal Board as submitted thereto by the Defendants) and the Modification Application made by the Plaintiff to said Appeal Board, the New York State Division of Human Rights did not undertake any efforts whatsoever.

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cc. Thereafter, the Defendants did submit a Brief to the Appeal Board; and I did undertake to prepare and file a Brief in support of the Plaintiff's position. Only at that point in time did the New York State Division of Human Rights enter an appearance, secure some additional time from the Appeal Board and submit a Brief in support of the Comsioner's Order.

dd. I undertook efforts to secure an expedited hearing on appeal to the Board, although I am not sure how successful my efforts were in that regard. The matter was set for argument before the Appeal Board in December, 1976; and I was advised that said argument was expedited, as a consequence of my efforts. I was advised that, because of the backlog and the nature and problems of the Appeal Board, the matter would not have otherwise been scheduled for argument at that time.

ee. I did appear at the argument before the Appeal Board; and I did present argument on behalf of my client. An attorney for the New York State Division of Human Rights (Sara Toll East, Esq.), who did prepare the Division's Brief, did appear as well and did present argument on behalf of the Commissioner.

ff. Thereafter, the Appeal Board of the New York State Division of Human Rights did affirm the decision of the Commissioner, handing down a decision in August, 1977. During the interim period of time (from argument to the date of decision) I communicated with my client on several occasions;

and I did communicate with the Appeal Board particularly after an undue length of time had transpired and no decision was forthcoming.

gg. Thereupon, the Defendants did file a Petition with the Supreme Court of the Appellate Division, First Department, seeking a stay of the Decisions and Orders of the Commissioner of the New York State Division of Human Rights and the New York State Human Rights Appeal Board. In that regard and on behalf of the Plaintiff I did prepare, file and serve an Answer to the Petition; and I did appear, along with the Attorney for the New York State Division of Human Rights, on behalf of the Commissioner, at a show cause hearing before the Appellate Division, First Department, with respect to the request for a Stay. At that proceeding, a stay was issued; but, at the same time, an expedited briefing schedule was set.

hh. Thereupon, I did file a Brief, on behalf of the Plaintiff, with the Appellate Division. Ms. East prepared and filed papers on behalf of the Division.

ii. The Appellate Division did affirm the aforementioned decisions and orders. The Defendants did seek reconsideration or leave to appeal; and, in that connection, I did submit papers in opposition thereto. Ms. East did prepare and file papers on behalf of the Commissioner.

jj. Thereafter, the Defendants did seek leave from the Court of Appeals to appeal from the Decision of the Appellate Division (as said decision affirmed the administrative determinations); but the Court

of Appeals denied leave. In that regard, I did prepare and file papers independent of the New York State Division of Human Rights.

5. The foregoing analysis sets forth, in substance, the efforts which I undertook in and during the state proceedings on behalf of the Plaintiff. They do not include the several efforts which I have taken, to date, on behalf of the Plaintiff in the federal proceedings (herein).

6. I am able to document the foregoing with specificity if such is deemed appropriate by the Court. The total number of hours spent on the administrative and court proceedings in the State, as described in Paragraph 4a-4jj, was fifty six (56) hours. The remaining hours, for which I seek compensation (as set forth in my Affidavit heretofore submitted prior to remand and resubmitted subsequent to the remand), total 26 for filing the Complaint herein (and preparing the same) and otherwise preparing and filing the Brief in support of the Application for fees (along with the several Affidavits).

7. By way of supplement to the previous application, I seek additional compensation for twenty five hours work in connection with the sucessful preparation and prosecution of the appeal herein and the efforts associated herewith subsequent to the remand. Among the efforts in this regard are: the preparation and filing of the Notice of Appeal, the preparation and filing of the Brief and Appendix to the Second Circuit, preparation and argument of this matter in and before the Second Circuit; and, upon remand, resubmission of papers previously filed in connection with the Application for Fees and attendance at

the conference in this regard and the preparation of the instant papers.

8. It should be noted that, in connection with my efforts as described in Paragraph 4a-4jj, it is my customary procedure and practice to confirm each conversation which I have in connection with a case (whether it be with a client or otherwise) in writing on the same date on which said conversation took place. In addition, whenever I receive a communication or send out a communication, it is my custom and practice to acknowledge receipt of the correspondence, document, etc. or to cover the document, etc. which I send out. Thus, by reviewing my files, I am able to document each and every telephone call, conversation, communication, and effort undertaken (as I have done heretofore in connection with the documentation of my hours and as I have done, again, in connection with the preparation of this document). Based on the same and in conjunction with my calendar I am able to confirm the hours for which I claim compensation.

9. If the Court deems such appropriate, I am willing and able to supply to the Court and to counsel the volume of communications which I have accumulated as evidence of the time spent (in addition to whatever other documentation, as evidence, the Court deems appropriate). I am attaching hereto a copy of the communications from the New York State Division of Human Rights indicating that, because of my involvement as attorney for the Complainant (Plaintiff), said Division would not participate in the proceedings by its attorney (on behalf of the Commissioner).

10. Since I have been requested to provide my salary in connection with this application, in view of my employment by the National Association for the Advancement of Colored People, Special Contribution Fund, Inc., I shall provide the same for each of the last four years (in as much as this matter has been on-going since January, 1975 and in as much as the great majority of the work done herein was done in 1975, 1976, 1977, and 1978).

a. 1975/$16,184.88
b. 1976/$17,139.00
c. 1977/$20,170.11
d. 1978/$25,035.98

11. During the years, so stated, I have worked an average of sixty five (65) hours per week for fifty two weeks (52). During that period of time, I have taken virtually no vacation and I have worked for most part, six days per week. Generally, I have worked approximately twelve (12) hours per day per week and approximately five (5) hours per weekend during each of the afore-stated years. Thus, I have worked, on the average, three thousand one hundred and twenty hours (3120) for each of the afore-stated years.

12. My average salary for the years stated is $19,642.50 (nineteen thousand, six hundred and forty two dollars and fifty cents).

13. Based on the foregoing, my average hourly wage during the afore-stated period has been five dollars and eighty one cents ($5.81).

WHEREFORE and in view of the foregoing, it is respectfully requested that this Court award as attorneys fees herein the sum of ten thousand seven hundred dollars

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($10,700.00) which sum represents the amount reflected in one hundred and seven (107) hours* at one hundred dollars ($100.00) per hour.

Respectfully submitted,

/s/ JAMES I. MEYERSON, ESQ.
JAMES I. MEYERSON, ESQ.
N.A.A.C.P.—1790 Broadway
New York, New York 10019
(212) 245-2100

Attorney for Plaintiff

Sworn to and subscribed before me
this 8th day of June, 1979.

/s/ THOMAS HOFFMAN
Notary Public

THOMAS HOFFMAN
Notary Public, State of New York
No. 31-6931965
Qualified in New York County
My Commission Expires March 30, 1980

* The one hundred and seven hours is obtained by adding to the original eighty two hours, the twenty five additional hours requested herein (for appellate efforts and efforts on remand).

Appendix H

(Affidavit)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CIVIL No. 77 Civ 4794

MS. CIDNI CAREY,

Plaintiff,

VS.

NEW YORK GASLIGHT CLUB, INC., et al.

JUDGE HENRY WERKER

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

James I. Meyerson, being first duly sworn, deposes and says:

1. I am one of the attorneys for the Plaintiff herein; and I execute this Affidavit in that capacity.

2. I have been primarily (almost solely) responsible for all of the representation of the Plaintiff herein and through the state administrative and judicial proceedings that heretofore have transpired.

3. I assert the facts and information set forth herein based on facts, information, and belief which I have secured as a consequence of my representation of the Plaintiff in

this proceeding and in all other proceedings attendant thereto.

4. On or about August 27, 1974, the Plaintiff, a Black American citizen, did seek a waitress position in and with the Defendant New York Gaslight Club, Inc. After auditioning and otherwise being interviewed, the Plaintiff was advised that there was no position available.

5. Believing that she was denied a position as a waitress in and with the Defendant New York Gaslight Club, Inc., because of her race and color, the Plaintiff did file a complaint with the New York District Office of the Equal Employment Opportunity Commission on or about January 9, 1975.

6. On January 24, 1975, the District Office of the Equal Employment Opportunity Commission did advise the Plaintiff's counsel that a complaint on behalf of the Plaintiff herein had been received by the office and accepted. A copy of said letter is attached hereto and made part hereof.

7. On January 28, 1975, the New York State Division of Human Rights did advise the Plaintiff that, pursuant to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000 (e)-5(c)), her complaint to the Equal Employment Opportunity Commission had been referred to said Division of Human Rights. It requested that the Plaintiff visit a particular office of the State Division within sixty (60) days for the purpose of filing a complaint with said Division. A copy of said letter of advisement is attached hereto and made part hereof.

8. On February 21, 1975, the Plaintiff did file a verified complaint with the New York State Division of Human Rights charging the Defendant New York Gaslight Club, Inc. and two of its employees (Ray Angelic and John Anderson, both of whom were in management positions) with discriminating against her by refusing to hire her because of her race and color (in substance the same charge which she brought against the New York Gaslight Club, Inc. and the two named individuals in the Equal Employment Opportunity Commission).

9. After investigation, the New York State Division of Human Rights found jurisdiction and probable cause to believe that the Defendants herein (as well as Ray Angelic who is not named herein) had engaged in an unlawful discriminatory practice.

10. Conciliation efforts failed and the case was recommended for public hearing (pursuant to the Rules and Regulations of the New York State Division of Human Rights).

11. On May 20, 1975, the Plaintiff's counsel did write to the New York District Office of the Equal Employment Opportunity Commission advising said Office that the Plaintiff herein was proceeding ahead in the State Division of Human Rights, per the referral and deferral by the Equal Employment Opportunity Commission to said State agency, and inquiring of the status of the matter before said Equal Employment Opportunity Commission. A copy of said letter is attached hereto and made part hereof.

12. On May 22, 1975, the New York District Office of the Equal Employment Opportunity Commission did respond

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to the foregoing letter and did indicate that, as soon as it was possible, an investigator would be assigned to the Plaintiff's matter and that she would be advised relative to the same. A copy of said letter is attached hereto and made part hereof.

13. From that correspondence, Plaintiff and her counsel assumed that there was an implicit advisement therein that the Equal Employment Opportunity Commission had reassumed jurisdiction of the matter and that dual jurisdiction existed.

14. Thereafter, upon due notice to all parties, the matter came on for hearing before the New York State Division of Human Rights, the Honorable Norman Mednick presiding as the duly appointed Hearing Examiner. Said proceedings commenced on September 22, 1975 and were continued to and concluded on January 15, 1976.

15. The Plaintiff herein was represented by James I. Meyerson, Esq., George E. Hairston, Esq., and Nathaniel R. Jones, Esq., all of whom represent the Plaintiff in the proceedings before this Court. James I. Meyerson, Esq., was almost solely responsible for the prosecution and preparation of the state administrative and judicial proceedings, on behalf of the Plaintiff herein; and he is solely responsible for the efforts before this Court.

16. The Defendants attorneys herein also represented them as Respondents in the New York State Division of Human Rights and the subsequent administrative and judicial proceedings attendant thereto.

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17. On August 13, 1976, the New York State Division of Human Rights did issue an order relative to this matter. A copy of the same is attached hereto and made part hereof.

18. The Division found that the New York Gaslight Club, Inc. and John Anderson (named Defendants herein) had discriminated against the Plaintiff because of her race and color and in violation of the Human Rights Law of the State of New York. The Division also concluded that Ray Angelic had not discriminated against the Plaintiff and dismissed the Complaint as against him.

19. Relying upon the same, the New York State Division of Human Rights directed the New York Gaslight Club, Inc. to offer the Plaintiff a position as a waitress and to otherwise pay over to her a sum of money (computed according to a formula set forth in the Order) as a back pay award.

20. On or about August 20, 1976, the Defendant New York Gaslight Club, Inc. did file a Notice of Appeal from the afore-mentioned decision and Order to the New York State Human Rights Appeal Board, an agency independent of the New York State Division of Human Rights.

21. At the same time, the Defendant New York Gaslight Club, Inc. did seek a stay of the operation of the Division decision and Order from the aforementioned Appeal Board; and it did secure the same absolving it from implementing the relief, as set forth, pending the outcome of the appeal therein.

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22. On August 26, 1977, the New York State Human Rights Appeal Board affirmed the findings and determination of the Commissioner of the New York State Division of Human Rights. A copy of said decision is attached hereto and made part hereof.

23. Thereafter, the Defendant New York Gaslight Club, Inc. did file an appeal with the Supreme Court/Appellate Division—First Judicial Department seeking to have the administrative determinations overturned. A stay was secured temporarily absolving said Defendant from implementing the relief, as ordered; and an expedited appeal schedule was set.

24. On November 3, 1977, the Supreme Court/Appellate Division—First Judicial Department did unanimously affirm the administrative determination and the relief ordered therein and based thereon. A copy of said Order is attached hereto and made part hereof.

25. A subsequent Motion for reargument or in the alternative for leave to appeal to the Court of Appeals was denied by the Appellate Division. Said Order was entered by the Appellate Division on January 10, 1978. A copy of said Order is attached hereto and made part hereof.

26. On February 14, 1978, the Court of Appeals of the State of New York did refuse the defendant New York Gaslight Club, Inc. leave to appeal thereto. A copy of said Order is attached hereto and made part hereof.

27. From May 22, 1975 (when Plaintiff's counsel received a correspondence from the District Office of the Equal

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Employment Opportunity Commission in response to a previous inquiry relative to the status of the matter therein) until on or about November 12, 1976 (at which time the matter was pending before the Appeal Board, the New York State Division of Human Rights having determined, at that point, that the Defendant New York Gaslight Club, Inc. was liable to the Plaintiff for discriminating against her—per the Human Rights Law of the State of New York), when counsel for the Plaintiff and a representative of the New York District Office of the Equal Employment Opportunity Commission did speak over the telephone about the status of the proceedings in the State Division of Human Rights, there were no communications between the Plaintiff and the Commission regarding the matter.

28. Subsequent to November 12, 1976 (on or about November 13, 1976), Plaintiff's counsel did forward to the New York District Office of the Equal Employment Opportunity Commission copies of the briefs and memoranda submitted by the various parties to the proceedings to the New York State Human Rights Appeal Board. A copy of the cover correspondence relative thereto is attached hereto and made part hereof.

29. On July 13, 1977 (or thereabouts), the Plaintiff did receive a letter from the District Office of the Equal Employment Opportunity Commission (in New York) notifying her that the Commission had decided not to litigate her matter (having found probable cause) and enclosing therein a Notice of Right to Sue Letter. A copy of said correspondence and the attachment thereto are attached hereto and made part hereof.

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30. Thereafter and within the mandated ninety (90) day period, the Plaintiff did file this federal action (pursuant to Title VII of the Civil Rights Act of 1964 as well as pursuant to the Civil Rights Act of 1866).

31. Plaintiff's counsel is unaware of any investigatory and/or conciliatory action taken by the Equal Employment Opportunity Commission in this matter once the matter was initially deferred and referred to the New York State Division of Human Rights, pursuant to 42 U.S.C. Section 2000 (e)-5(c), and notwithstanding that the Commission apparently reassumed jurisdiction over the matter subsequent thereto (per a legal obligation and responsibility to the Plaintiff herein).

32. Plaintiff never requested a Notice of Right to Sue Letter from the Equal Employment Opportunity Commission. In point of fact, Plaintiff never requested that the Equal Employment Opportunity Commission reassume jurisdiction over this matter pursuant to Title VII provisions and subsequent to the initial deferral and referral.

33. In point of fact, the Plaintiff elected to continue in the State Division of Human Rights pursuant to the deferral thereto by the Equal Employment Opportunity Commission and in view of the fact that the proceedings had commenced therein with reasonable dispatch (at least, initially), notwithstanding that the Plaintiff could have elected to request the Equal Employment Opportunity Commission to reassume jurisdiction sixty (60) days after

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the deferral and referral and, presumably, any time thereafter.

Respectfully submitted,

.....

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Attorney for Plaintiff

BY: /s/ JAMES I. MEYERSON

Sworn to and subscribed before me
this 14th day of April, 1978.

/s/ MABEL D. SMITH
NOTARY PUBLIC

MABEL D. SMITH
Notary Public, State of New York
No. 61-4517944
Qualified in New York County
Commission Expires March 30, 1980

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-192

NEW YORK GASLIGHT CLUB, INC. and JOHN ANDERSON, Manager of the NEW YORK GASLIGHT CLUB, INC.,

Petitioners,

against

Ms. CIDNI CAREY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF

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On the Brief:
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF

Opinions Below and Jurisdiction of This Court

This is an appeal from an order entered on May 8, 1979 by The United States Court of Appeals for the Second Circuit, 598 F2d 1253, which, by a divided court, reversed the order and decision of the U.S. District Court for the Southern District of New York (Henry F. Werker, U.S.D.J.) 458 F.Supp.79. Jurisdiction of this Court is based on 28 U.S.C. Sec. 1254(1), a writ of certiorari having been issued by this Court on October 9, 1979.

Statutes Involved

This case involves the construction of Section 706(k) of Title VII of the Civil Rights Act of 1964, Pub.L. 88-352, 78 Stat. 259, 42 U.S.C. 2000e-5(k) which provides that:

> "In any action or proceeding under this subchapter the court in its discretion may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person."

The provisions of Section 706(c) of Title VII of the Civil Rights Act of 1964, Pub.L. 88-352, 78 Stat. 259, 42 U.S.C. 2000e-5(c) likewise bear upon the issues. That section provides:

> "In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a

> written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority."

In the resolution of this controversy, consideration need also be given to the import of Section 297(4)(a) of the Executive Law of the State of New York, which provides that:

> "Within two hundred seventy days after a complaint is filed, or within one hundred twenty days after the board has reversed and remanded an order of the division dismissing a complaint for lack of jurisdiction or for want of probable cause, unless the division has dismissed the complaint or issued an order stating the terms of a conciliation agreement not objected to by the complainant, the division shall cause to be issued and served a written notice, together with a copy of such complaint, as the same may have been amended, requiring the respondent or respondents to answer the charges of such complaint and appear at a public hearing before a hearing examiner at a time not less than five nor more than fifteen days after such service and at a place to be fixed by the division and specified in such notice. The place of any such hearing shall be the office of the division or such other place as may be designated by the division. The case in support of the complaint shall be presented by one of the attorneys or agents of the division and, at the option of the complainant, by his attorney. With the consent of the division, the case in support of the complaint may be presented solely by his attorney. No person

who shall have previously made the investigation, engaged in a conciliation proceeding or caused the notice to be issued shall act as a hearing examiner in such case. Attempts at conciliation shall not be received in evidence. At least two business days prior to the hearing the respondent shall, and any necessary party may, file a written answer to the complaint, sworn to subject to the penalties of perjury, with the division and serve a copy upon all other parties to the proceeding. A respondent who has filed an answer, or whose default in answering has been set aside for good cause shown may appear at such hearing in person or otherwise, with or without counsel, cross examine witnesses and the complainant and submit testimony. The complainant and all parties shall be allowed to present testimony in person or by counsel and cross examine witnesses. The hearing examiner may in his discretion permit any person who has a substantial personal interest to intervene as a party, and may require that necessary parties not already parties be joined. The division or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent and any other party shall have like power to amend his answer. The hearing examiner shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and a record made."

Questions Presented for Review

1. Does Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), authorize an award of attorney's fees for services rendered in a New York State proceeding where that State does not authorize such attorney's fees

but provides counsel to present the case in support of the complaint?

2. Was the decision of Judge Werker an appropriate exercise of discretion by the District Court so that the reversal and remand directed by the United States Court of Appeals for the Second Circuit was erroneous?

Statement of the Case

Respondent prosecuted a complaint against the Petitioners and another in which she charged said persons with unlawful discrimination on the basis of her race (A 3). The Respondent succeeded as against the Petitioners but did not succeed as against the third party named in the State proceedings (A 70). While review of the order of the New York Division of Human Rights was pending before the courts of New York, the Respondent received a notice of right to sue from the Equal Employment Opportunity Commission (A 3, 4, 30). Within the statutory 90-day period, this action was commenced in the United States District Court in order to preserve Respondent's rights (A 4, 29). In July, 1978, the New York State proceedings having been concluded in favor of the Respondent and against the Petitioners, and having afforded to her all the relief sought in the Federal action other than attorney's fees, the action in the District Court, which had been commenced only against the Petitioners, was dismissed (A 35). By affidavit verified April 17, 1978 which was filed prior to the order of dismissal, Respondent applied for an award of attorney's fees (A 36-51 inclusive). The application for attorney's fees was denied by Judge Werker (A 24-28 inclusive). Respondent thereafter moved for modification of Judge Werker's decision and for leave to supplement the record (A 52-61 inclusive). Such application was denied by Judge

Werker. A copy of such memorandum of denial is not included in the appendix because the same is not available in the Court files. Upon appeal to the Circuit Court of Appeals for the Second Circuit, a divided court reversed and remanded the case to Judge Werker (A 1-23 inclusive).

ARGUMENT

I

Section 706(k) of the Civil Rights Act of 1964 does not authorize the award of fees for services rendered in proceedings before the New York State Courts and administrative agencies.

This case involves a conflict between the power granted to Congress by the Fourteenth Amendment to the Constitution and the power reserved to the states by the Tenth Amendment to the Constitution.

Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), does not purport to create a new cause of action for legal fees for services rendered to vindicate the rights of persons deprived of their constitutional rights. That statute merely provides that a court may allow a prevailing party "a reasonable attorney's fee as part of the costs . . .". Congress has the power to establish costs to be paid to a prevailing party in a litigation before the United States Courts or a United States Administrative Agency. The several states, on the other hand, in the exercise of their governmental functions have the power to control their own judicial systems and their administrative agencies.

The State of New York in its Human Rights Law which anteceded the Civil Rights Act of 1964, in Section 297(4)(a)

of the Executive Law, provided in part for the operation of its Division of Human Rights and for the procedure applicable to the processing and/or hearing of complaints before said Division. It set forth that "the case in support of the complaint shall be presented by one of the attorneys or agents of the Division and at the option of the complainant by his attorney. With the consent of the Division, the case in support of the complaint may be presented solely by his attorney." This is the manner in which the State of New York has provided for the prosecution of complaints before its Human Rights Division. The question posed is whether Congress, by enactment of Section 706(k) of the Civil Rights Act of 1964, can or did alter the statutory scheme of the New York law.

The Executive Law of New York does not authorize the payment of attorney's fees to prevailing parties and the New York Court of Appeals has determined that such fees are not allowable, *State Division of Human Rights* v. *Luppino, et al.*, 29 NY 2d 558 (1971).

The New York Court in the cited case, decided after the enactment of the Civil Rights Act of 1964, did not believe that the attorney's fees provisions contained in Section 706(k) of said Act applied to New York proceedings.

Congress has deferred to the State control of proceedings to vindicate Title VII rights. Section 706(c) 1964 Civil Rights Act, 42 U.S.C. 2000e-5(c). Does that deferral not imply a Congressional intent that all of the procedural aspects incident to such proceedings should be determined by the several states?

This Court, in *Florida* v. *United States,* 282 US 194, indicated, at page 211, that " . . . whenever the Federal power is exerted within what would otherwise be the domain of state power the justification of the exercise of the Federal power must clearly appear".

In *Florida Avocado Growers* v. *Paul,* 373 US 132, at page 142, this Court pointed out "the principle to be derived from our decision is that Federal regulation of field of commerce should not be deemed preemptive of State regulatory power in the absence of persuasive reasons—whether that the nature of the regulated subject might permit no other conclusion, or that the Congress has unmistakedly so ordained".

In *Schwartz* v. *Texas,* 344 US 199, at page 202, this court said "it will not be presumed that a Federal statute was intended to supersede the exercise of power of the State unless there is a clear manifestation of intention to do so. The exercise of Federal supremacy is not lightly to be presumed".

This court has pointed out in *Christiansburg Garment Co.* v. *EEOC,* 434 US 412, at page 420, that the legislative history of Section 706(k) is sparse.

Putting aside the question of whether the interpretation of 706(k) as authorizing an award of legal fees by a U.S. District Court for services rendered in a state proceeding would lead to an unconstitutional result, as an unwarranted interference with the sovereignity of the states, there is no legislative history or clear mandate in the language of this statute to justify the interpretation made by the Second Circuit in this case.

Judge Mulligan pointed out in his dissent below:

> "It seems to me to be fundamental that remuneration of private counsel successful in state agency and state judicial proceedings in vindicating rights under state law should be determined by the law of the state which established the substantive right, created the agency and provided for judicial review." (A 16).

Congress does not normally legislate on the subject of costs in state proceedings. Had it intended to do so, it should have clearly manifested such intention. It did not.

The Second Circuit has, we respectfully submit, also misinterpreted the relationship of the Federal Government to the states in the enforcement process under Title VII of the 1964 Civil Rights Act. The deference to the state mechanism is not an integral part of the Federal enforcement process. The state mechanism is primary. The Federal mechanism is a stand-by procedure, only to be brought into play if the state mechanism fails to function.

Senators Dirksen and Humphrey, co-sponsors of the State Deferral Section, made the following comments regarding the Federal-State relationship in Title VII matters.

Sen. Dirksen:—This section was enacted ". . . to keep primary, exclusive jurisdiction in the hands of the State Commission for a sufficient period of time to let them work out their own problems at the local level." 110 Cong. Rec. 13087 (1964).

Sen. Humphrey commented that a fundamental policy of the EEOC Act is to avoid Federal action whenever possible by deferring to the State or local authority where such authority provides for the processing of discrimination claims, 110 Cong. Rec. 12701, 12708, 13088 (1964).

Salutary though its motives may be, Section 706(k) of the 1964 Civil Rights Act is not so necessary to the functioning of Title VII as to justify impingement on the inherent powers of the states, nor should it be interpreted to extend to state proceedings in the absence of a clear indication of Congressional intent to make it applicable to such litigated or administrative proceedings.

II

The District Court in its discretion denied respondent's application for attorney's fees and such exercise of discretion should not have been overturned by the Circuit Court of Appeals.

Section 706(k) of the 1964 Civil Rights Act, 42 U.S.C. 2000e-5(k) and the holding of this court in *Christiansburg Garment Co.* v. *EEOC, supra,* established that the award of attorney's fees as a part of costs are a matter of discretion for the District Court.

Judge Werker's memorandum decision (A 24-28 inclusive) was predicated on his analysis of the circumstances of the litigation. He was of the opinion that the EEOC was in error in issuing the right to sue letter (A 26). He also believed that the New York law afforded Respondent the option of obtaining counsel supplied by the New York Division of Human Rights without cost to her (A 27). Respondent and her counsel did not expect legal fees from Petitioner and should not, in Judge Werker's view, obtain a windfall (A 27). Nowhere did Judge Werker question his power to award attorney's fees.

It is fundamental that where discretion is vested in a Court, the fact that an appellate tribunal might have come to a different conclusion is insufficient grounds for reversal. Unless there was an abuse of discretion, the lower court decision is inviolate.

The Circuit Court of Appeals in this case, in order to justify its reversal, drew a distinction between the presentation of a case "in support of a complaint" mandated by New York Executive Law, 297(4)(a), and the presentation of a case in support of a plaintiff. We submit that this is a distinction without substance. Although there might be

certain circumstances where relief had been denied to the complainant by the Division of Human Rights whereby the position of the attorney for the Division was at variance with the interest of the complainant before it, that is not a circumstance which occurred in this case.

When this case was heard before the New York Division of Human Rights, the Respondent elected to engage her own counsel, who assisted her ably and well, but the Hearing Officer participated actively in the presentation of evidence in support of the complaint to the point where the Petitioner here urged in the proceedings to review the determination of the Division of Human Rights that the Hearing Officer's conduct exceeded the bounds of propriety. There is nothing in this record from which it can be surmised that the result would have been different had the case in support of respondent's complaint been presented solely by the attorneys for the Division.

Counsel in this case was supplied to the Respondent by the NAACP Special Contribution Fund, Inc. This factor may well have been an element considered by Judge Werker when he referred to a windfall which neither plaintiff nor her counsel expected and poses the question of whether or not a public interest law firm is entitled to recover attorney's fees. Counsel is unaware of any case in which this question has been considered by this Court. The NAACP Special Contribution Fund, Inc., is subsidized in part by the tax exempt status accorded it under the Internal Revenue Code. Such status precludes it from engaging in profit-making ventures, either directly or through its employed counsel.

This Court suggested in *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400, and in *Christiansburg Garment Co.* v. *EEOC, supra,* that legal fees, or compensation, are an im-

portant motive in encouraging private attorneys general to vindicate constitutional rights.

We do not believe that the history of the NAACP warrants the conclusion that it requires an award of counsel fees to stimulate its interest in a just cause. The award of counsel fees in the facts of this case, are punitive only and not salutary.

Whether one agrees with the conclusions of Judge Werker, or not, certainly his conclusions were not an abuse of the discretion vested in him by the applicable statute.

CONCLUSION

It is respectfully submitted that, for the reasons stated herein, the decision of the Circuit Court of Appeals for the Second Circuit should be reversed and that of the District Court reinstated.

Respectfully submitted,

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IN THE

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RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

Opinions Below

The Memorandum Decision of the United States District Court for the Southern District of New York, dated September 15, 1978, is reported at 458 F.Supp 79 (Appendix at pages A24-A28). The divided decision of the United States Court of Appeals for the Second Circuit, dated May 8, 1979, is reported at 598 F.2d 1253 (Appendix at pages A1-A23).

Additional Statutory Provisions

The discussion of the issues herein involves reference to Title XI of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 268, 42 U.S.C. Section 2000h-4, which provides:

> "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."

To the extent that the Petitioners make reference to Section 297 (4)(a) of the Executive Law of the State of New York and set forth its provisions by erroneously quoting it as follows:

> "The case in support of the complaint shall be presented by one of the attorneys or agents of the division and, at the option of the complainant, by his attorney. With the consent of the division, the case in support of the *complaint* may be presented solely by his attorney." (Emphasis added)

the provision should read:

> "With the consent of the division, the case in support of the *complainant* may be presented solely by his attorney." (Emphasis added).

The inaccuracy is repeated at page 7 of the Petitioners' Brief.

Counterstatement of the Question Presented

Whether, as the majority of the Court of Appeals below held, the Respondent, an aggrieved civil rights Plaintiff, is entitled to recover attorney's fees under Section 706 (k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5(k), for her successful prosecution of an employment discrimination matter in a state administrative proceeding pursuant to a deferral to said agency, by the Equal Employment Opportunity Commission, under Section 2000e-5(c) of Title VII of the Civil Rights Act of 1964.[1]

Counterstatement of Case

On or about August 27, 1974, the Respondent (Plaintiff-Appellant below), a Black American citizen, sought a waitress position with the Petitioner New York Gaslight Club, Inc. (Defendant-Appellee below). After an audition and an interview, the Respondent was advised that there was no position available.[2]

Believing that she was denied a position as a waitress with the Petitioner Gaslight Club, Inc., because of her race,

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[1] The Circuit Court below posed the question in this form:

> "The issue in this case . . . is whether the general policy of awarding attorney's fees to successful plaintiffs in Title VII actions envisions an award to a party who is successful in pursuing her claim before the state human rights agency without having to pursue her case in federal court. . . . The question is whether §706 (k) encompasses fee awards to complaining parties who succeed at a step in the statutory scheme before they are forced to litigate their claims in federal court." Appendix at page A6.

[2] See: Appendix at pages A64-A72 (setting forth Order, Findings and Decision of New York State Division of Human Rights). See also: Appendix B herein (with relevant attachments) at pages b1-b18.

the Respondent filed a complaint, through her attorneys, with the New York District Office of Equal Employment Opportunity Commission (EEOC) on or about January 9, 1975. Appendix A herein at pages a1-a3.

On January 24, 1975, the EEOC advised the Respondent's attorney that a complaint had been received by the office and accepted. Appendix B herein at page b9.

On January 28, 1975, the New York State Division of Human Rights advised the Respondent that, pursuant to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e-5(c)), her complaint to the EEOC had been deferred to it. The Division directed the Respondent to file a complaint with its office within sixty (60) days. Appendix B herein at page b10.

On February 21, 1975, the Respondent filed a verified Complaint, virtually identical to her EEOC Complaint, with the New York State Division of Human Rights (Appendix at pages A62-A63) charging the Petitioners and Ray Angelic[3] with discriminating against her by refusing to hire her because of her race.

After investigation, at which the Respondent was represented by counsel, the New York State Division of Human Rights found probable cause to believe that the Petitioners had engaged in an unlawful discriminatory practice.

Conciliation efforts failed and the case was recommended for public hearing pursuant to the Rules and Regulations of the New York State Division of Human Rights (9 N.Y. C.R.R. Section 465.11).

[3] Ray Angelic was a management employee of the Petitioner Gaslight Club. Unlike Petitioner Anderson, Manager of the New York Gaslight Club, he was not held responsible for any unlawful discriminatory act against the Respondent.

On May 20, 1975, Respondent's counsel wrote to the EEOC, advising it that the Respondent was proceeding ahead in the State Division of Human Rights, per its deferral to said State agency, and inquiring of the status of the matter before the EEOC. Appendix B herein at page b11.

On May 22, 1975, the EEOC responded to the foregoing letter and indicated that, as soon as it was possible, an investigator would be assigned to the Respondent's matter and that she would receive further advisement. Appendix B herein at page b12.

The matter came on for hearing before the New York State Division of Human Rights with James I. Meyerson, and George E. Hairston appearing for the Respondent and Albert Proujansky appearing for the Petitioners. There was no attorney from the New York State Division of Human Rights at the Division proceedings which were held on two separate days.

On August 13, 1976, the New York State Division of Human Rights issued an Order after Hearing holding that the Petitioners had discriminated against the Respondent because of her race in violation of the Human Rights Law of the State of New York, Article 15 of the Executive Law, 18 McKinney's Sections 290 *et seq.*, although it concluded that Ray Angelic had not discriminated against the Respondent and dismissed the Complaint as to him. Appendix at pages A64-A72.

The Petitioners were directed to offer to the Respondent a position as a waitress and to pay to her a sum of money as a back pay award. No attorney's fee was awarded.[4]

[4] The Human Rights Law of the State of New York does not provide for attorney's fees; and such fees have not been authorized. See: *State Division of Human Rights* v. *Gorton*, 302 N.Y.S. 2d 966, 32 A.D. 2d 933 (2nd Dept. 1969); *State Division of Human Rights* v. *Speer*, 313 N.Y.S. 2d 28, 35 A.D. 2d 107 (2nd Dept. 1970), *reversed on other grounds*, 324 N.Y.S. 2d 247, 29 N.Y. 2d 555 (1971).

On or about August 20, 1976, the Petitioners filed a Notice of Appeal from the aforementioned decision and Order (pursuant to Section 297-a of the Executive Law) to the New York State Human Rights Appeal Board, an agency independent of the New York State Division of Human Rights; and they secured a stay postponing implementation of the relief pending the outcome of the appeal therein.

On December 20, 1976, the Respondent and the Petitioners' counsel received notice from the EEOC advising them that, after examination of the record and proceeedings before and in the New York State Division of Human Rights, it had been determined that there was reasonable cause to believe that the Petitioners had engaged in an unlawful discriminatory practice in violation of Title VII of the Civil Rights Act of 1964. Appendix A herein at pages a4-a6.

At the same time the EEOC inquired as to whether the parties would be willing to conciliate the matter informally, with the assistance of that Agency; and, on or about December 29, 1976, the Respondent responded affirmatively. Appendix A herein at page a7.

On August 26, 1977, the New York State Human Rights Appeal Board affirmed the findings and determination of the Commissioner of the New York State Division of Human Rights.

Thereafter, the Petitioners appealed to the New York Supreme Court/Appellate Division—First Judicial Department and obtained a stay postponing implementation of the relief pending resolution of the appeal.

On November 3, 1977, the administrative determinations were unanimously affirmed. *New York Gaslight Club* v.

State Division of Human Rights on the Complaint of Carey, 59 A.D. 2d 852 (1st Dept. 1977). Appendix B herein at pages b14-b16.

A subsequent Motion for reargument or in the alternative for leave to appeal to the New York State Court of Appeals was denied. Appendix B herein at page b17. Thereafter the Court of Appeals of the State of New York denied the Petitioners leave to appeal thereto. *New York Gaslight Club, supra* at 43 N.Y. 2d 951 (1978). Appendix B herein at page b18.

On July 13, 1977, before the decision of the Appeal Board was received, the Respondent received a letter from the EEOC notifying her that it had decided not to litigate her matter and enclosing therein a Notice of Right to Sue.

Thereafter and within the mandated ninety (90) day period, the Respondent filed a federal action, pursuant to both Title VII of the Civil Rights Act of 1964, as amended, and the Civil Rights Act of 1866, 42 U.S.C. Section 1981 (Appendix at pages A19-A34), and the Petitioners answered the same denying virtually all of the allegations set forth in the Complaint (Appendix D herein at pages d1-d2).

While this matter was still pending in the New York State Courts (upon appeal thereto by the Petitioners from the administrative determinations adverse to their interest), the District Court convened a status conference at which the Respondent indicated that the only issue which she anticipated litigating therein was the issue of whether she should be awarded fees for the success in the State Division of Human Rights (anticipating that said success would maintain in the New York Courts despite the efforts of the Petitioners to reverse it) pursuant to the Title VII provisions authorizing fees thereunder. Appendix at pages A73-A79.

When the Respondent's success in the New York State Division of Human Rights was upheld by the New York Court, the only issue submitted to the District Court was whether the Respondent was entitled to attorney's fees. The Petitioners agreed to the same and did not request a de novo hearing, to which they were entitled on the issue of liability (under Title VII), apparently conceding the same at that point and notwithstanding their previous denial.

On September 21, 1978, the District Court issued a decision (458 F.Supp. 79 (S.D.N.Y. 1978)), denying Respondent attorney's fees under Title VII for the successful efforts in the State Division of Human Rights.

On September 30, 1979 Respondent filed a timely Motion seeking modification of the Memorandum Decision and leave to supplement the record. The Petitioners filed papers in opposition to said Motion.

In addition, Adele Graham, Esq., an attorney for the New York State Division of Human Rights, filed an affidavit in support of the Respondent's application, seeking to clarify the role of a Division attorney in the Division process. Appendix at pages A58-A61.

In her Affidavit, Ms. Graham set forth the policy, practice and role of the Division attorney within the State administrative proceedings and noted, categorically, that the Division encouraged complainants to obtain private counsel for the purpose of prosecuting their respective complaints in the State Division. In addition, Ms. Graham noted that, because the Respondent had obtained private counsel, the Division attorney did not participate in the administrative process. Finally, Ms. Graham noted that, whenever a Division attorney participates in the administrative proceedings and otherwise, the attorney acts for the Division, on behalf of complaint, and not for the Complainant. Appendix at pages A59-A60.

On November 3, 1978, the District Court filed an Order, with notation, denying the Respondent's Motion.

Believing that the District Court below was in error, both in its initial decision and in its subsequent failure to modify the same, the Respondent appealed to the United States Court of Appeals for the Second Circuit.

On May 8, 1979, the United States Court of Appeals for the Second Circuit reversed the decision and order of the District Court and remanded the matter for consideration of an award of counsel fees (with Senior Circuit Judge Smith writing the majority opinion, in which Circuit Judge Mansfield joined and from which Circuit Judge Mulligan dissented), 598 F.2d 1253 (2nd Cir. 1979).

Summary of the Argument

I.

Deference to a state forum is an integral part of the enforcement scheme of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000(e) *et seq.*).

The purpose of the enactment of Title VII was to ". . . assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin." *Alexander* v. *Gardner-Denver Company,* 415 U.S. 36, 44, 94 S. Ct. 1011, 39 L. Ed. 2d 147, 155 (1974).

Congress created a comprehensive procedure involving both "state and local equal employment opportunity agencies as well as the Equal Employment Opportunity Com-

mission", *Alexander* v. *Gardner-Denver Company, supra* at 415 U.S. 44, to secure compliance with the Act and accomplish the goals manifested therein.

In substance, the state proceeding herein was an extension of the federal proceeding and was envisioned by Congress to be a part of the federal statutory scheme encompassed within and under Title VII of the Civil Rights Act of 1964.

II.

The provisions in Title VII and the interpretations of it by this Court make it clear that the relationship between the state and federal forums is "complementary", *Alexander* v. *Gardner-Denver Company, supra* at 415 U.S. 50, since the inter-related and primary consideration is the enforcement of the national policy to eliminate discrimination in employment.

Where the state remedy proves to be inadequate in the enforcement of the Congressional policy to eliminate employment discrimination, the statutory scheme contemplates resort to federal remedy, independent of the state remedy, to facilitate cumulative and comprehensive relief for the wrong committed.

The doctrine of preemption is of limited relevance in the present context, *New York Telephone Company* v. *New York Labor Department,* 440 U.S. 519, 527, 99 S. Ct. 1328, 59 L. Ed. 2d 553 (1979), if it is relevant at all. To the extent that it is relevant, the principles enunciated by this Court in those cases which address the doctrine reinforce the proposition that the supplementary action taken by the federal court, in awarding fees, was proper and correct and otherwise consistent with said doctrine. In addition, Title XI of the Civil Rights Act of 1964, 42 U.S.C.

2000h-4, supports the decision of the Circuit Court below, under the theory and doctrine of preemption, assuming its limited relevance in this context.

III.

The award of attorney's fees is appropriate and necessary as part of the comprehensive relief envisioned by Title VII, as redress for a wrong under the Act, "in all but special circumstances." *Christiansburg Garment Co.* v. *EEOC,* 434 U.S. 412, 417, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978); *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 415, 98 S. Ct. 2362, 445 L. Ed. 2d 280 (1975).

As a prevailing party in an enforcement proceeding recognized as an integral part of Title VII enforcement, the Respondent is entitled to the award of fees which, themselves, are designed to further the purpose of the Act.

IV.

Viewing the emphasis of the inter-relatedness between administrative and judicial mechanisms, as well as state and federal forums, for effecting the purposes of Title VII of the Civil Rights Act of 1964, the Respondent is entitled to recover fees for her successful state administrative efforts, upon deferral thereto by the federal administrative agency charged with enforcing Title VII (pursuant to mandate thereunder), through resort to a federal court which has ultimate responsibility for enforcing Title VII and carrying out the Congressional policy encompassed therein.

V.

The efforts of the public interest attorneys representing the complainant in the New York State Division of Human

Rights, upon deferral thereto by the Equal Employment Opportunity Commission (after the Respondent, with the assistance of her public interest attorneys filed a complaint with the EEOC), were necessary and resulted in the enforcement of the policy adopted by Congress in Title VII of the Civil Rights Act of 1964.

Respondent's attorneys carried the entire burden during the state Division proceedings and prior thereto and were responsible for making the record and submitting the post trial arguments upon which a favorable decision was based.

The attorney for the New York State Division of Human Rights does not represent the complainant but rather the interest of the Division in the complaint; and, accordingly, the fiduciary between the Division attorney and a complainant is much more limited than the fiduciary between the complainant and a privately retained counsel or a public interest attorney.

ARGUMENT

An Aggrieved Civil Rights Plaintiff Is Entitled to Recover Attorney's fees, Under Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5(k), for the Successful Prosecution of an Employment Discrimination Matter in a State Administrative Proceeding Pursuant to a Deferral to Said Agency, by the Equal Employment Opportunity Commission, Under Section 2000e-5(c) of Title VII of the Civil Rights Act of 1964.

I. Deference to a State Forum Is an Integral Part of the Enforcement Scheme of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000(e) *et seq.*).

To the end that Title VII of the Civil Rights Act of 1964 was enacted ". . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin", *Alexander* v. *Gardner-Denver Company,* 415 U.S. 36, 44, 94 S.Ct. 1011, 39 L.Ed. 2d 147, 155 (1974), citing *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 800, 93 S.Ct. 1817, 3 L.Ed. 2d 668 (1973) and *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 429-430, 91 S.Ct. 849, 28 L.Ed. 2d 158 (1971), Congress created a comprehensive procedure involving both "state and local equal employment opportunity agencies as well as the Equal Employment Opportunity Commission", *Alexander* v. *Gardner-Denver Company, supra* at 415 U.S. at 44, to secure compliance with the Act.

That the state proceeding is part and parcel of the entire Title VII procedure is beyond question. See: *Harris* v. *Commonwealth of Pennsylvania,* 419 F.Supp. 10, 13 (M.D. Pa. 1976); *Plummer* v. *Chicago Journeyman Plumb-*

ers, etc., 452 F.Supp. 1127, 1136 (N.D. Ill. 1978); *Flesch* v. *Eastern Pennsylvania Psychiatric Institute,* 434 F.Supp. 963, 969 at footnote 3 (E.D. Pa. 1977); *Bell* v. *Wyeth Laboratories, Inc.,* 448 F.Supp. 133, 136 (E.D. Pa. 1978); *Equal Employment Opportunity Commission* v. *Delaware Trust Co.,* 416 F.Supp. 1040, 1044 (D. Del. 1976); *Presseisen* v. *Swarthmore College,* 386 F.Supp. 1337, 1340 (E.D. Pa. 1974); *Black Musicians of Pittsburgh* v. *Musicians Local 60-471,* 375 F.Supp. 902, 908-909 (W.D.Pa. 1974), *affirmed without opinion* 544 F.2d 512 (3rd Cir. 1976); *Equal Employment Opportunity Commission* v. *Wah Chang Albany Corp.,* 499 F.2d 187, 189 (9th Cir. 1974).[5]

The Respondent herein initially filed a formal complaint with the EEOC challenging the Petitioners conduct under Titile VII of Civil Rights Act of 1964. Upon receipt of the same, the EEOC deferred the matter to the New York State Division of Human Rights, as it was required to do pursuant to Section 2000e-5(c) of Title VII of the Civil Rights Act of 1964, holding it in "suspended animation"

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[5] The Circuit Court below wrote in this regard:

"Deference to State mechanisms for resolving discrimination complaints is an integral part of the enforcement process under Title VII, 42 U.S.C. §2000e-5(c), and submission to state remedies is a jurisdictional prerequisite to EEOC action. See Equal Employment Opportunity Commission v. Union Bank, 408 F.2d 867, 869 (9th Cir. 1968). The statutory framework of Title VII embodies a 'federal mandate of accommodation to state action.' Voutsis v. Union Carbide Corp., 452 F.2d 889, 892 (2nd Cir. 1971), cert. denied, 406 U.S. 918 (1972).

* * *

Thus, state human rights agencies play an important role in the enforcement process of Title VII, since they afford a chance to resolve a discrimination complaint in accordance with federal policy before such a complaint reaches the federal courts." Appendix at pages A6-A8.

See also: *Alexander* v. *Gardner-Denver Co., supra* at 415 U.S. 44.

pending the outcome of the state proceeding.[6] *Love* v. *Pullman Co.,* 404 U.S. 522, 526, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972). The deferral was mandatory and not optional. See: *Oscar Mayer & Co.* v. *Evans,* —— U.S. ——, 99 S.Ct. 2066, 60 L.Ed. 2d 609, 615-616, footnote 3 (1979).

In substance, the state proceeding herein was an extension of the federal proceeding and was envisioned by Congress to be a part of the federal statutory scheme encompassed within and under Title VII of the Civil Rights Act of 1964.

II. Because of the Inter-Related and Complementary Nature of the State/Federal Title VII Enforcement Mechanism, Title VII Authorizes Resort to a Federal Court Where the State Forum Does Not Provide Full and Complete Relief.

The provisions in Title VII and the interpretations of it by this Court make clear that the relationship between the state and federal forums is "complementary", *Alexander* v. *Gardner-Denver Company, supra* at 415 U.S. 50, since their inter-related and primary consideration is the enforcement of the national policy to eliminate discrimination in employment.

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[6] In an amicus brief submitted to the Circuit Court below by the New York State Division of Human Rights (Appendix C herein), it was acknowledged that a "work sharing" agreement existed between the Division and the EEOC. Addressing the purpose and intention of the 1978 Agreement between said agencies, the Division noted that:

"... the 1978 Worksharing Agreement (Ex. B) 'in recognition of the common jurisdiction and goals, was intended to integrate the charge processing procedures and reduce duplication of effort by sharing primary responsibility' (Ex. B p. 2)" Appendix C herein at page c8.

Reference is made to a similar statement of purpose and intention incorporated into a 1976 Agreement and quoted therefrom by the Division in its amicus brief. Appendix C at pages c8-c9. See also: *Bucyrus-Erie Co.* v. *Department of Industry, Labor, etc.,* 599 F.2d 205, 212, footnote 12 (7th Cir. 1979), *appeal pending* 48 U.S.L.W. 3181 (August 16, 1979).

There can be little doubt that the federal scheme embodied in the laws, rules, and regulations of Title VII "contemplates and encourages enforcement of state fair employment statutes as an integral component of the federal statutory framework," *Bucyrus-Erie Co.* v. *Department of Industry Labor, etc., supra* at 599 F.2d, 211. Consistent with that view, "the legislative history of Title VII . . . emphasized the coordination with and utilization of state fair employment laws." *Bucyrus-Erie Co.* v. *Department of Industry, Labor, etc., supra* at 599 F.2d 211.

However, while Congress may have intended through Section 2000e-5(c) "to screen from the federal court those problems of civil rights that could be settled to the satisfaction of the grievant in 'a voluntary and localized manner', See 110 Cong. Record 12725 (June 4, 1964) (remarks of Sen. Humphrey)", *Oscar Mayer & Co.* v. *Evans, supra* at 60 L.Ed. 2d 609, the purposes underlying the enactment of Title VII were clearly based on the congressional recognition that ". . . 'state and local FEPC laws vary widely in effectiveness. . .'", *Voutsis* v *Union Carbide Corporation,* 452 F.2d 889, 894 (2nd Cir. 1971), *cert. denied* 406 U.S. 918, 92 S.Ct. 1768, 32 L.Ed. 2d 117 (1972), cited by this Court in *Oscar Mayer & Co., supra* at 60 L.Ed. 2d 615, 619.

Since Title VII is "a remedial statute to be liberally construed in favor of victims of discrimination", *Mahroom* v. *Hook*, 563 F.2d 1369, 1375 (9th Cir. 1977), *cert. denied* 436 U.S. 904, 98 S.Ct. 2234, 56 L.Ed. 2d 402 (1978),[7] where

[7] See also: *EEOC* v. *Wah Chag Albany Corp., supra* at 499 F.2d 189; *Davis* v. *Valley Distributing Co.,* 522 F.2d 827, 832 (9th Cir. 1975), *cert. denied* 429 U.S. 1090, 97 S.Ct. 1099, 51 L.Ed. 2d 535 (1977); *Gill* v. *Monroe County Dept. of Social Services,* 79 F.R.D. 316, 333 (W.D.N.Y. 1978); *Ramirez* v. *National Distillers and Chemical Corp.,* 586 F.2d 1315, 1321 (9th Cir. 1978).

the state remedy proves to be inadequate in the enforcement of the Congressional policy to eliminate employment discrimination, the statutory scheme contemplates ultimate resort to the federal remedy, independent of the state remedy, to facilitate cumulative and comprehensive relief for the wrong committed. *Voutsis* v. *Union Carbide Corporation, supra* at 452 F.2d 893. See also: *White* v. *Dallas Independent School District*, 581 F.2d 556, 561 (5th Cir. 1978) (en banc).

There is little doubt that "the system of remedies is a complementary one, with the federal remedy designed to be available after the state remedy has been tried" without producing full and complete results. *Voutsis* v. *Union Carbide Corporation, supra* at 452 F.2d 894. That is, as this Court clearly held:

> "The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Alexander* v. *Gardner-Denver Co., supra* at 415 U.S. 48-49.

In other words, "Congress did not intend to foreclose federal relief simply because state relief was . . . foreclosed", *Oscar Mayer & Co.* v. *Evans, supra* at 60 L.Ed. 2d 619, citing the remarks of Senator Humphrey to the Senate where he noted that "where States are unable . . . to provide . . . protection, the federal Government must have the authority to act."

Ultimately, as this Court recognized, responsibility for the enforcement of Title VII rests with federal courts. Under the Act, those courts are authorized "to order such affirmative relief as may be appropriate to remedy the effects of unlawful employment practices" and "to secure

compliance with Title VII", *Alexander* v. *Gardner-Denver Company, supra* at 415 U.S. 44-45,[8] even where the EEOC has found that there is no cause to believe that Title VII has been violated. See: *McDonnell Douglas Corp.* v. *Green, supra* at 411 U.S. 798-799.

Inasmuch as the state forum herein did not provide the Respondent with the full and complete relief envisioned by Congress as a "comprehensive solution for the problem of invidious discrimination in employment", *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459, 95 S.Ct. 1716, 44 L.Ed. 2d 295, 301 (1975), she was entitled to resort to the federal court in order to secure full relief under Title VII. The legislative history of Title VII manifests a congressional intent to allow an individual to pursue his rights in a federal forum, under the Act, independent of and subsequent to actions in a state forum. See: *Johnson* v. *Railway Express Agency, supra* at 421 U.S. 459, citing *Alexander* v. *Gardner-Denver Co., supra* at 415 U.S. 48.

There is no reason to deviate from the principle that "courts confronted with procedural ambiguities in the statutory framework have with virtual unanimity resolved them in favor of the complaining party", *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455, 461 (5th Cir. 1970), cited with approval in *Davis* v. *Valley Distributing Company, supra* at 522 F.2d 832, when the complaining party, as here, has been denied the full and complete relief clearly intended by Congress under Title VII because of a deficiency in the remedy provided by a deferral state agency.

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[8] See also: *Al-Hamdani* v. *State University of New York*, 438 F.Supp. 299, 302 (W.D.N.Y. 1977); *EEOC* v. *General Telephone of the Northwest, Inc.*, 599 F.2d 322, 326, footnote 2 (9th Cir. 1979); *Dickinson* v. *Chrysler Corp.*, 456 F.Supp. 43, 45-48 (E.D. Mich. 1978)

The reason an interested state refuses to act, upon deferral under the Act, is immaterial. The federal purpose is met by the deferral, itself, and subsequent resort to the federal forum is specifically contemplated. See: *Pacific Maritime Association* v. *Quinn*, 465 F.2d 108, 110 (9th Cir. 1972), cited in *Davis* v. *Valley Distributing Company, supra* at 522 F.2d 831-832, footnote 12 and *Oscar Mayer & Co.* v. *Evans, supra* at 60 L.Ed. 2d 619. See also: Remarks of Senator Humphrey addressing the limitations of federal deference:

> "(A)t the same time we recognized the absolute necessity of providing the Federal Government with authority to act in instances where States and localities did not choose to exercise these opportunities to solve the problems of civil rights in a voluntary and localized manner * * *. In instances where States are *unable* or unwilling to provide this protection, the Federal Government must have the authority to act." (Emphasis added). 110 Cong. Record 12725 (June 4, 1964).

"The heart of the deferral requirement is that the state must prohibit the act of discrimination complained of", *White* v. *Dallas Independent School District, supra* at 581 F.2d 560, and nothing more. Deferral cannot be avoided merely because the State does not provide all of the remedies available under Title VII. See: *Crosslin* v. *Mountain States Telephone and Telegraph Co.*, 422 F.2d 1028, 1031 (9th Cir. 1970), *cert. granted, opinion vacated and remanded for further consideration*, 400 U.S. 1004, 91 S.Ct. 562, 27 L.Ed. 2d 618 (1971); *White* v. *Dallas Independent School District, supra* at 581 F.2d 560; *Bauman* v. *Union Oil Company*, 400 F.Supp. 1021, 1025 (N.D. Cal. 1973). Deferral is defined "only in terms of time", *Crosslin, supra* at 422 F.2d 1031, and the requirement "that the

state must prohibit the act of discrimination complained of." *Nueces County Hospital District* v. *EEOC,* 518 F.2d 895 (5th Cir. 1975).

In fact there is authority that, once having commenced the state process, an aggrieved party is foreclosed from prematurely seeking relief in a federal court until completion of the state efforts (even though the individual has not voluntarily elected to seek redress in the state forum but is mandatorily referred thereto by the federal agency to which the individual elected to seek recourse initially). See: *Rios* v. *Enterprise Association Steamfitters Local Union No. 638 of U.A.,* 326 F.Supp. 198, 203-204 and cases cited therein (S.D.N.Y. 1971), *affirmed* 501 F. 2d 622 (2nd Cir. 1972).

Since the purpose of Title VII, however, is remedial in nature, providing extensive and comprehensive relief for the victim of the prohibited act of discrimination, it would be contrary to the intent of the Act to foreclose an individual who prevailed in a state forum, upon deferral thereto, from resort to a federal court in order to secure relief permitted under Title VII but not otherwise provided for under the State law. For, in light of "the unusual statutory scheme of Title VII", *Gavin* v. *Peoples Natural Gas Co.,* 464 F.Supp. 622, 626 (W.D. Pa. 1979), it is doubtful that Congress intended a "scheme wherein the EEOC could process a claim which the state had dismissed but that the federal court would be barred by the state's action." *Gavin* v. *Peoples Natural Gas Co., supra* at 464 F.Supp. 625. In short, ". . . Section 706(c) was never intended to create absolute deference to states." *Karan* v. *Nabisco, Inc.,* 78 F.R.D. 388, 401 (W.D. Pa. 1978).

There can be no doubt, therefore, that, to the extent that the state fair employment mechanisms do not provide for the comprehensive relief specifically set forth in the Title

VII legislation, there is a clear intent that federal law would supplement the state proceeding to give full and complete meaning to the Act. Even the Petitioners themselves concede that "the federal mechanism is . . . to be brought into play if the state mechanism fails to function." Petitioner's Brief at page 9.

Thus, the deferral requirement of Title VII is designed to "encourage comity", *Gavin* v. *Peoples Natural Gas Co., supra* at 464 F.Supp. 625, and to give the state first opportunity, but not the sole and exclusive opportunity, to provide a remedy for a discriminatory employment practice. Where, as here, the relief in the first instance is incomplete, it is incumbent upon a federal court to provide the plaintiff with an opportunity to secure the more all encompassing and comprehensive relief envisioned by the Congress when it enacted Title VII. See: *Dickinson* v. *Chrysler Corp., supra* at 456 F.Supp. 45-48.

To the extent that the state has proscribed procedural mechanisms for addressing a matter, upon deferral, such procedural mechanisms are not at all sacrificed because they have been supplemented by substantive comprehensive relief.

Thus, the award of fees, as a substantive matter, is not inconsistent or in conflict whatsoever with what the state does in the context of its own limitations, legislatively or otherwise. It merely supplements that which is not available under state law to remedy a condition found by Congress to be violative of public policy and law.

It is submitted that much of the doctrine of preemption is, as in *New York Telephone Company* v. *New York Labor Department,* 440 U.S. 519, 527, 99 S.Ct. 1328, 59 L.Ed. 2d 553 (1979), ". . . of limited relevance in the present context"; and, accordingly, the effect of the Petitioners to cast

the issue within the preemption doctrine is substantially misplaced.

Petitioners' reliance upon *State of Florida* v. *United States,* 282 U.S. 194, 51 S.Ct. 119, 75 L.Ed. 291 (1931) and *Florida Lime and Avocado Growers* v. *Paul,* 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed. 2d 248 (1963), in the context of the issues raised in this case, is without cause. Both *State of Florida* and *Florida Avocado Growers* address the issue of the regulation of commerce among and between the states and the effect thereof on the states' regulation of commerce within their own respective boundaries.

Those cases are thereby significantly dissimilar from the situation at hand. To the extent, however, that pronouncements set forth in those cases are applicable herein, they tend to reinforce the proposition advanced by the Respondent.[9]

The "proper application of the [preemption] doctrine must give effect to the intent of Congress", *Malone* v. *White Motor Co.,* 435 U.S. 497, 504, 98 S.Ct. 1185, 55 L.Ed. 2d 443 (1978), for "the purpose of Congress is the ultimate touchstone." *Retail Clerks* v. *Schermerhorn,* 374 U.S. 90, 103, 84 S.Ct. 219, 11 L.Ed. 2d 179 (1963). In the context of the issue raised in this case, it is clear, from statutory language and Court pronouncements, that federal law is to be accorded paramount consideration when providing relief to a person wronged under Title VII.

[9] The same is true, as well, with respect to *Schwartz* v. *State of Texas,* 344 U.S. 199, 73 S.Ct. 232, 97 L.Ed. 231 (1952) which is cited by the Petitioners to advance their position and which addressed the "application of a federal statute to state proceedings." *Schwartz* v. *State of Texas, supra* at 344 U.S. 201. The question raised in that case was whether communications barred from use as evidence in a federal criminal prosecution could be introduced as evidence in a state proceeding. This Court held that they could, finding that it did not believe "that Congress intended to impose a rule of evidence on the state court." *Schwartz* v. *State of Texas, supra* at 344 U.S. 203. In the instant case, there is no indication that Congress has preempted the state proceeding whatsoever and imposed any substantive, evidential, or procedural requirement on the state forum. Rather, there is every indication that Congress sought to provide the federal forum to an aggrieved party where the state forum, upon deferral thereto, proved to be inadequate in providing the comprehensive remedy contained in the federal anti employment discrimination Act. Its purpose "to effect that result is clearly manifested." *Reid* v. *State of Colorado,* 187 U.S. 137, 148, 23 S.Ct. 92, 47 L.Ed. 108 (1902), cited in *Schwartz* v. *State of Texas, supra* at 344 U.S. 203.

It is submitted that independent compliance with both state law and federal law is not an impossibility. *Florida Avocado Growers* v. *Paul, supra* at 373 U.S. 142-143. In fact compliance is quite feasible and totally reconcilable.

In light of the clear presence of federal power in the instant case, the question herein ". . . is not one of authority to act, but of its appropriate exercise." *State of Florida* v. *United States, supra* at 282 U.S. 211-212. Although Congress has not explicitly and specifically so ordained,[10] the reasons are persuasive that the exercise herein was appropriate and contemplated, *Florida Avocado Growers* v. *Paul, supra* at 373 U.S. 142, envincing the ". . . general intent to accord parallel or overlapping remedies against discrimination." *Alexander* v. *Gardner-Denver Co., supra* at 415 U.S. 47.

[10] While preemption is authorized under Title XI of the Civil Rights Act of 1964 where conflict or inconsistency with state law is manifest, Congress did not spell out preemption in the context of the attorney's fees provision under Title VII. While not conceding that the award of fees by a federal court is preemptive (where a state forum does not provide the prevailing party with the same), if it is to be articulated in such terms, it is important to note that "while preemption by implication is not favored . . . there is no requirement that Congress identify the several categories of state law it wishes to preempt." *Prevel Industries* v. *State of Conn.,* 468 F.Supp. 490, 492 (D.C. Conn. 1978), *affirmed without opinion* 603 F.2d 214 (2nd Cir. 1979), citing *Florida Lime & Avocado Growers, Inc.* v. *Paul, supra* at 373 U.S. 132.

Finally, if the issue herein is appropriately framed in preemptive terms, Title XI of the Civil Rights Act of 1964 (42 U.S.C. Section 2000h-4) specifically authorizes the same where, as here, the deferral state legislation manifests an inconsistency with the purpose of Title VII or any provisions therein.

Title XI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000h-4, provides:

> "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."

While the statutory scheme as a whole does not envision preemption, Congress has provided that, where a provision of state law is in conflict with the enunciated purpose of Title VII or any provisions therein (by specific language or by omission), the federal law supersedes.

Such subsequent resort to the federal remedy does not mean that the federal forum has preempted the state rights, duties, obligations, mechanisms, and procedures in this respect. Rather it does exactly what it is designed by Congress to do, to wit: supplement the deferral state relief which, because of legislative omissions, is not fully consistent with the purpose of Title VII, as with the attorney's fee provision herein.

III. The Award of Attorney's Fees Is Envisioned as Part of the Full and Comprehensive Remedy in the Enforcement of the Congressional Policy to Eliminate Employment Discrimination.

Pursuant to the detailed scheme of enforcement enacted by Congress under Title VII, provision is made for a court to "allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . .", Section 706(k) Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5(k).

While Section 706(k) appears to leave the award of attorney's fees to the sound discretion of a District Court, it is nevertheless apparent from this Court's clear and convincing pronouncements that "under Section 706(k) of Title VII a prevailing plaintiff . . . is to be awarded attorney's fees in all but special circumstances." *Christiansburg Garment Co.* v. *EEOC,* 434 U.S. 412, 417, 98 S.Ct. 694, 54 L.Ed. 2d 648 (1978). See also: *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed. 2d 1263 (1968); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 450, 415, 98 S.Ct. 2362, 45 L.Ed. 2d 280 (1975).[11] Among other of the strong equitable considerations "counseling an attorney's fee award to a prevailing Title VII" complainant, *Christiansburg Garment Co.* v. *EEOC, supra* at 434 U.S. 418, is this Court's recognized concept that a private litigant "is the chosen instrument of Congress to vindicate 'a policy considered of the highest priority.' " *Christiansburg Garment*

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[11] In *Newman, supra* at 390 U.S. 410-402, this Court "found that an identical attorney's fees provision in Title II of the 1964 Civil Rights Act was intended to 'encourage individuals injured by racial discrimination to seek judicial relief' ", *Grubbs v. Butz,* 548 F.2d 973, 975, footnote 11 (D.C. Cir. 1976), casting a Title II grievant "in the role of 'a private attorney general, vindicating a policy that Congress considered of the highest priority' ", *Christiansburg Garment Co.* v. *EEOC, supra* at 434 U.S. 416, citing *Newman* v. *Piggie Park Enterprises, supra* at 390 U.S. 402. The *Piggie Park* rationale was held by this Court to be applicable to Title VII matters in *Albemarle Paper Co.* v. *Moody, supra* at 422 U.S. 415.

Co. v. *EEOC, supra* at 434 U.S. 418, citing *Newman* v. *Piggie Park Enterprises, supra* at 390 U.S. 402.

As noted by the Circuit Court below, the approach adopted by this Court in *Christiansburg, supra,*

> "stems from a recognition that it is in the public interest to aid Title VII enforcement through private actions, and a liberal reading of the attorney's fees provisions encourages this effort." Appendix at page A6.

At least one commentator has noted that the inclusion of the attorney's fees provision by Congress in the Title was the result " . . . of the Senate's effort to shift primary responsibility for enforcing Title VII from the EEOC to aggrieved individuals." *Grubbs* v. *Butz, supra* at 548 F.2d 975, citing Vaas, Title VII: Legislative History, 7 B.C. Ind. & Com. L. Rev. 431, 435 (1966).

By the mandated procedural deferral in this matter, the EEOC, through the efforts of the Respondent, did "effectuate the congressional policy against . . . discrimination", *Johnson* v. *Georgia Highway Express,* 488 F.2d 714, 716 (5th Cir. 1974), as encompassed in Title VII of the Civil Rights Act of 1964.

Thus, the Respondent is entitled to attorney's fees which, themselves, are designed to further the purposes of the Act. *Newman* v. *Piggie Park Enterprises, supra* at 390 U.S. 400. See also: *Albemarle Paper Co.* v. *Moody, supra* at 422 U.S. 405; *Lea* v. *Cone,* 438 F.2d 86 (4th Cir. 1971; *Evans* v. *Sheraton Park Hotel,* 503 F.2d 177 (D.C. Cir. 1974); *Parker* v. *Califano,* 561 F.2d 320 (D.C. Cir. 1977); *Johnson* v. *Georgia Highway Express, Inc., supra* at 488 F.2d 714; *Rios* v. *Enterprise Association Steamfitters Local 638 of U.A.,* 400 F.Supp. 993 (S.D.N.Y. 1975), *affirmed* 542 F.2d 579, 592-593 (2nd Cir. 1976), *cert. denied* 430 U.S. 911, 97 S.Ct. 1186, 51 L.Ed. 2d 588 (1977); *August* v. *Delta Airlines,*

Inc., 600 F.2d 699, 701 (7th Cir. 1979); *Mid-Hudson Legal Services, Inc.* v. *G & U, Inc.,* 578 F.2d 34, 37 (2nd Cir. 1978); *Davis* v. *Murphy,* 587 F.2d 362, 364 (7th Cir. 1978) (under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. Section 1988); Nussbaum, *Attorney's Fees in Public Interest Litigation,* 48 N.Y.U.L.Rev. 301, 321-322 (1973).

It is submitted that, to deny a deferral Plaintiff the right to attorney's fees, when that Plaintiff has prevailed in a state forum which does not authorize the award of the same, but to permit a prevailing party the right to fees in a nondeferral state, would raise serious equal protection problems and would create a fundamental inconsistency in the comprehensive federal anti-discrimination legislation, which Congress obviously did not intend.

Even more incongruous would be the result of awarding an unsuccessful state litigant attorney's fees after seeking resort to a federal forum and prevailing therein, upon receipt of a Notice of Right to Sue, but denying the successful state litigant access thereto solely because of a success.

Under the circumstances of this litigation, it cannot be disputed that the Respondent was a "prevailing party." See: *Gagne* v. *Maher,* 594 F.2d 336, 339-341 (2nd Cir. 1979), *appeal pending* and cases *cited* therein (discussing "prevailing party"). See also: *Kopet* v. *Esquire Realty Company,* 523 F.2d 1005, 1008-1009 (2nd Cir. 1975). Thus, when the state position was finalized in the Respondent's favor, the only matter addressed by the District Court below was the issue of fees.

The Plaintiff filed a complaint in the federal District Court, seeking full and complete relief under Title VII, including a prayer for reinstatement, back pay, and attorney's fees. Notwithstanding that the Petitioners could have requested a de novo hearing before the District Court on the issue of liability and appropriate relief, they declined

to do so, apparently conceding the liability issue. *Batiste* v. *Furnco Construction Corp.*, 503 F.2d 447, 451 (7th Cir. 1974), *cert. denied* 420 U.S. 928, 95 S.Ct. 1127, 43 L.Ed. 2d 399 (1975), where the Court held that "while a defendant can be required to defend again, it cannot be forced to accept prior findings". See also: *Chandler* v. *Roudebush*, 425 U.S. 840, 96 S.Ct. 1949, 48 L.Ed. 2d 416, 432, footnote 39 (1976) where this Court noted that, in the de novo proceedings, "it can be expected that, in light of the prior administrative proceedings, many potential issues can be eliminated by stipulation . . ." or otherwise. In accord: *Alexander* v. *Gardner-Denver Co., supra* at 415 U.S. 60.

The Respondent, having achieved an appropriate finding of liability under the New York State Human Rights Law[12] and relief by way of a backpay award and an offer of a position, merely sought to secure the more comprehensive relief encompassed under Title VII, i.e., attorney's fees.

In other words, to deny the Respondent the federal relief sought herein, would penalize her for successfully enforcing the Title VII anti-discrimination policy in the state forum to which she was mandatory deferred by the very Act. The Circuit Court below recognized this incongruity (Appendix at page A12) and rejected the inequity which was clearly not envisioned by Congress when it enacted Title VII as a unifying federal statutory anti-discrimination scheme.

In effect, the state action (inaction) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941), cited in *Bucyrus-Erie Co.* v. *Department of Industry, Labor, etc., supra* at 599 F.2d 207.

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[12] It should be noted that "the Human Rights Law is undoubtedly a function of the equal protection guaranty" as encompassed within the Fourteenth Amendment to the United States Constitution. *Board of Education of Union Free School District*, 345 N.Y.2d 93, 97 (2nd Cir. 1973).

In fact, the awareness that additional supplemental relief can be secured from the federal forum is an incentive to obtain voluntary compliance within the state forum, thus avoiding invocation of formal adjudicatory processes in both the state forum and the federal forum.

It is even reasonable to believe that, if the Petitioners had known that attorney's fees could ultimately be secured from and through the federal forum, conciliation in the state forum might have been secured, thereby effecting "the promotion of dispute resolution through accommodation rather than litigation." See: *Weise* v. *Syracuse University*, 522 F.2d 397, 412 (2nd Cir. 1975).[13]

Thus, while the awarding of fees herein "may appear somewhat at odds" with the "encouragement of private

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[13] The majority of the Circuit Court below found that the award of fees in circumstances at hand could discourage "needless litigation", Appendix at pages A-12-13, recognizing that "acts awarding fees should not be interpreted so as to 'encourage plaintiffs to try cases in which reasonable settlement offers have been received, merely to ensure a fee award.'" *Gagne* v. *Maher, supra* at 594 F.2d 340.

In the instant case conciliation and settlement were discussed but they were never reached because of the refusal on the part of the Petitioners to meaningfully engage in the process. Furthermore, even after the formal administrative process resulted in a ruling against the Petitioners, they refused to engage in further settlement discussion.

To the contrary, the Petitioners spent considerable time, effort, and, it is assumed, attorney's fees, seeking to overturn the administrative decisions and orders of those courts, although they apparently advanced no substantial legal or factual issue to justify a meaningful discussion, let alone a reversal, of the administrative decisions.

Thus, contrary to the dissenting opinion in the Court below (Appendix at pages A19, A21-22 and footnote 7 therein) that an award in the instant case would promote litigation, there is every reason to believe that an award of fees could promote meaningful informal resolution of the controversy and avoid meaningless litigation by both parties, particularly since this Court has sanctioned the award of fees against an unsuccessful Title VII plaintiff. See: *Christiansburg Garment Co.* v. *EEOC, supra* at 434 U.S. 412; *Kremer* v. *Chemical Construction Corp.*, 477 F. Supp. 587, 594 (S.D.N.Y. 1979).

settlement to avoid unnecessary litigation under Title VII", ". . . the two themes are reconciled in the context of their joint remedial purpose: devising a flexible network of remedies to guarantee equal employment opportunities." *Johnson* v. *Railway Express Agency, supra* at 421 U.S. 472 (Marshall, J., Douglas, J., Brennan, J., concurring in part and dissenting in part).

IV. Title VII Authorizes the Award of Fees for Success by an Aggrieved Party in an Administrative Proceeding.

While there appears to have been "scant attention . . . focused on the attorney's fee provision amid the sound and fury of the extended debates on the 1964 Civil Rights Act", *Grubbs* v. *Butz, supra* at 548 F.2d 975, thus making the legislative history of Section 706 (k) "sparse", *Christiansburg Garment Co.* v. *EEOC, supra* at 434 U.S. 420, nevertheless Circuit Judge Wright undertook a detailed analysis and examination of the legislative history and statutory framework of Title VII in *Parker* v. *Califano, supra* at 561 F.2d 320 and concluded that "a federal district court has authority to award attorney's fees that include compensation for work done in related administrative proceedings." Decision of the Circuit Court below, footnote 8, Appendix at page A9.

The *Parker* Court, relying on, among other authorities, *Newman* v. *Piggie Park Enterprises, supra* at 390 U.S. 400 and *Johnson* v. *Georgia Highway Express, Inc., supra* at 488 F.2d 716, held that the award of attorney's fees encourages the congressional policy designed to foster private enforcement of federal civil rights enactments and, ultimately, to secure broad compliance with the law.

In discussing the statutory language of Section 706(k), Judge Wright, quoting from *Johnson* v. *United States,* 12 EPD ¶ 11,039 at 4841 (B.O. Md. 1976), *affirmed,* 554 F.2d 632 (4th Cir. 1977), noted:

> "Had Congress wished to restrict an award of an attorney's fee to only suits filed in court, there would have been no need to add the words 'or proceeding' to any action. But proceeding is a broader term than 'action' and would include an administrative as well as judicial proceeding." *Parker* v. *Califano, supra* at 561 F.2d 331, cited by the Circuit Court below in footnote eight (8), Appendix at pages A9-A10.[14]

Viewing this Court's emphasis on the "interrelatedness of Title VII's administrative and judicial enforcement scheme in the private sector", *Parker, supra* at 561 F.2d 331, citing *Alexander* v. *Gardner-Denver Co., supra* at 415 U.S. 47, the *Parker* Court concluded "that in a Title VII suit brought by a federal employee, attorney's fees awarded under Section 706 (k) may include compensation for work done at both judicial and administrative levels", *Parker, supra* at 561 F.2d 324, and that, "for a conscientious lawyer representing a federal employee in a Title VII claim, work done at the administrative level is an integral part of the work necessary at the judicial level." *Parker, supra* at 561 F.2d 333. See also: *Canty* v. *Olivarez,* 452 F.Supp. 762, 769 (N.D. Ga. 1978), citing *Parker* v. *Califano* with approval in

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[14] Consistent with the view expressed by the *Parker* Court, it is the duty of a Court, ". . . when interpreting an act of Congress, to construe it in such a manner as to give effect to all its parts and to avoid a construction which would render a provision surplusage." *Wadsworth* v. *Whaland,* 562 F.2d 70, 78 (1st Cir. 1977), *cert. denied* 435 U.S. 980, 98 S.Ct. 1630, 56 L.Ed. 2d 72 (1978). That is, as this Court held: ". . . all words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent." *McDonald* v. *Thompson,* 305 U.S. 263, 266, 59 S.Ct. 176, 178, 83 L.Ed. 1264 (1938), citing *Ginsberg & Sons* v. *Popkin,* 285 U.S. 204, 208, 52 S.Ct. 322, 76 L.Ed. 704 (1932); *Exparte Public Bank,* 278 U.S. 101, 104, 49 S.Ct. 43, 44, 73 L.Ed. 202 (1928). See also: *Wilderness Society* v. *Morton,* 479 F.2d 842, 856-857 (D.C. Cir. 1973), *cert. denied* 411 U.S. 917, 93 S.Ct. 1550, 36 L.Ed. 2d 309 (1973).

this regard (again in the context of a federal administrative process); *Smith* v. *Califano,* 446 F.Supp. 530, 531 (D.D.C. 1978), citing *Parker, supra* and *Williams* v. *Boorstin,* 451 F.Supp. 1117, 1125-1126 (D.D.C. 1978); *Patton* v. *Andrus,* 459 F.Supp. 1189 (D.D.C. 1978); *Fisher* v. *Boorstin,* 561 F.2d 340 (D.C. Cir. 1977); *Brown* v. *Batke,* 588 F.2d 634, 638 (8th Cir. 1978); *McMullen* v. *Warner,* 416 F.Supp. 1163, 1167 (D.D.C. 1976); *Fisher* v. *Adams,* 572 F.2d 406, 409 (1st Cir. 1978); *Whiteside* v. *Gill,* 580 F.2d 134, 140 (5th Cir. 1978).[15]

Inasmuch as "the Title VII enforcement scheme has included both administrative proceedings and judicial actions" from its inception, the denial of the fees awarded herein by the Court below would clash "sharply with the clearly perceived structure and aims of the Title." *Parker* v. *Califano, supra* at 561 F.2d 331. See also: *Brown* v. *Batke, supra* at 588 F.2d 636, affirming a District Court attorney's fees award, under the Attorney's Fees Civil Rights Act, for ". . . hours spent in proceedings before the Nebraska Equal Opportunity Commission and in Nebraska State Court, prior to the filing of the federal suit."

Thus, the reasoning of the majority below in these respects is "persuasive". *Marshall* v. *Communications Workers of America,* 21 EPD ¶ 12,719 (D.D.C. 1979), citing *Carey* v. *New York Gaslight Club, Inc., supra* at 598 F.2d 1253.

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[15] In a Freedom of Information Act litigation, where "administrative" efforts were undertaken to secure information but said information was not forthcoming until after a lawsuit had been instituted, it has been held that attorney's fees are proper. See: *Cuneo* v. *Rumsfeld,* 553 F.2d 1360 (D.C. Cir. 1977). See also: *Nationwide Bldg. Maintenance, Inc.* v. *Sampson,* 559 F.2d 704 (Court of Appeals, D.C. 1977); *Vermont Low Income Advocacy Council* v. *Usery,* 546 F.2d 509 (2nd Cir. 1976); *Jones* v. *U.S. Secret Service,* 81 F.R.D. 700 (D. D.C. 1979; *Marschner* v. *Department of State,* 470 F.Supp. (D.C. Conn. 1979).

V. The Private Representation of the Respondent in the Division Proceeding Was Authorized and Otherwise Necessary to Effect the Purposes of Title VII Thereby Justifying the Award of Fees Under the Act for the Efforts in Those Proceedings.

The Human Rights Law of the State of New York makes it clear that, at and during the Division proceedings, the Division attorney appears in support of the complaint (New York Executive Law, Section 297(4)(a)) rather than on behalf of the Complainant and, accordingly, represents the interest of the Division in the complaint.

The Petitioners advance the position that the distinction is one "without substance", Petitioners' Brief at page 12, and that the appearance by private counsel for the Respondent herein was superfluous at best. Such is hardly accurate and valid, as the majority in the Circuit Court below held. Appendix at pages A10-12 and at footnote 9 at pages A11-12.

Prior to 1964, when Title VII was enacted, the Executive Law of the State of New York did not permit a complainant to appear in a Division proceeding, by attorney or otherwise, unless the Division, in its discretion, granted the complainant an intervenor status. New York Session Laws, 1945, Chapter 118, Section 1.

Per a 1968 amendment to the law, the complainant was granted the right to appear, by counsel or otherwise, in a Division proceeding. New York Session Laws, 1968, Chapter 958, Section 6.

Thus it is apparent that the legislative history of the Human Rights Law of the State of New York was amended to promote the right of involvement of private counsel in a Division proceeding on behalf of a complainant. The Amendment, itself, acknowledged the significance of the right and emphasized the position of a private counsel in the Division proceedings. It is not inconsequential, moreover, that the Amendment, granting said right, was enacted subsequent to the passage of Title VII.

Significantly, at the investigative stage of the Division proceedings (after a complaint has been filed with the Division but before any sort of determination is made), the Division attorney plays no role whatsoever. Amicus Brief, Appendix C herein at pages c5-c6. See also: Rules of Practice of the New York State Division of Human Rights, 9 N.Y.C.R.R. Section 465.11.

Such is important since, at that stage, it is determined whether probable cause exists to go forward to a plenary hearing or whether the matter will be resolved in the form of a summary judgment type disposition. See: *Mitchell* v. *National Broadcasting Company,* 553 F.2d 265, 270-271 (2nd Cir. 1977).

In the instant case, the Respondent's attorney appeared with her at the initial investigatory proceedings and without a Division attorney present; and requested that certain information be produced. Subsequently, a probable cause finding was issued.[16]

To the extent that an investigatory conference was held in this manner, such was the only preliminary involvement by the Division in this effort. The posture of the Division employee at the investigatory conference was neutral rather than in an affirmative posture on behalf of the Respondent.

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[16] Significantly, approximately three years prior to that date, the Respondent, *pro se,* sought relief against the same Petitioners for discrimination (based on *sex*—as she charged); and a no probable cause finding was made. Thus, there is evidence that the presence of Respondent's counsel at the initial phase of this proceeding was very important, if not critical.

The position of dissenting Circuit Judge Mulligan below that "a Division investigator was assigned here and a finding of probable cause made", Appendix at pages A19-A20, and that "there was no suggestion by Carey [Respondent] of any inadequacy in the Division's handling of the investigation", Appendix at page A20, misses the point and totally misunderstands the reality of the investigative effort, by the Division herein. There was none.

Moreover, the Division attorney's representation on behalf of a complainant is otherwise significantly limited.

In a proceeding where the complainant does not prevail (by Commissioner's decision and order), the Division attorney cannot appeal the adverse decision, upon the complaint and for the complainant, because such would be inconsistent with the finding of the Commissioner whom the Division attorney, in fact, represents. Affidavit of Adele Graham, Appendix at page A61.

In addition, where the complainant secures only partial relief, upon prevailing, and seeks further relief in an appeal, the Division attorney will not represent the complainant in said effort since to do so would be inconsistent with the position of the Division, which said attorney represents on any appeal. Affidavit of Adele Graham, Appendix at page A61. See also *Matter of Mize* v. *State Division of Human Rights,**—— A.D.2d ——, 359 N.Y.S.2d 241 (2nd Dept. 1974).

Furthermore, where a party prevails before the Commissioner and an appeal is prosecuted by the non-prevailing party to the Appeal Board and the decision is reversed by the Appeal Board (against the complainant and the Commissioner), the Division attorney (who would appear before the Appeal Board to justify the decision of the Commissioner, upon the Complaint of the charging party) would not and cannot appeal the decision of the Appeal Board to the courts of the State of New York. *State Division of Human Rights* v. *State Human Rights Appeal Board,* —— A.D.2d —— (4th Dept. 1978), *leave to appeal denied,* 46 N.Y.2d 705 (1978).

It is apparent then that the New York State Division of Human Rights attorney, while ostensibly representing the complainant in a Division proceeding, in fact represents the Division itself upon the complaint, and not the complainant himself/herself. Affidavit of Adele Graham, Appendix at pages A59-A61. Therefore, the distinction as between the

"complainant" and the "complaint" has substantial and significant ramifications.

It is acknowledged herein that Respondent's counsel participated in all of the proceedings, that "the Division attorney did not appear at all during the extensive two day trial at which the complete record was made," and that "the entire burden of placing evidence in the record, and arguing the significance thereof, was borne by the attorney for the plaintiff." Affidavit of Adele Graham, Division Attorney, Appendix at page A59. See also: Amicus Brief, Appendix 6 herein at pages c3, c5.[17]

[17] Notwithstanding the Petitioners' position to the contrary, it is inconsequential for attorney's fees purposes that the Respondent's "private counsel" was an employee of a public interest organization. See: Footnote 1 of the Decision of the Circuit Court below (Appendix at pages A3-A4); *Reynolds* v. *Coomey*, 567 F.2d 1166, 1167 (1st Cir. 1978); *Rios* v. *Enterprise Association Steamfitters Local 638 of U.A.*, *supra* at 400 F.Supp. 996; *Mid Hudson Legal Services, Inc.* v. *G & U., Inc.*, *supra* at 578 F.2d 34; *Perez* v. *Rodriguez Bou*, 575 F.2d 21, 24 (1st Cir. 1978); *Rodriguez* v. *Taylor*, 569 F.2d 1231, 1245 (3rd Cir. 1977); *Palmigiano* v. *Garrahy*, 466 F.Supp. 732, 736 (D. R.I. 1979); *Fairly* v. *Patterson*, 493 F.2d 589, 606-607 (5th Cir. 1971). *Thompson* v. *Madison County Board of Education*, 496 F.2d 682, 689 (5th Cir. 1974); *Brandenburger* v. *Thompson*, 494 F.2d 885, 889 (9th Cir. 1974); *Gagne* v. *Maher*, *supra* at 594 F.2d 345; Awards of Attorney's Fees to Legal Aid Officers, 87 Harv. L.Rev. 411 (1973). At best, public interest status may affect the amount of an award; but it certainly does not foreclose an award totally.

To the extent that the Petitioners argue that the District Court's decision was predicated on an exercise of discretion rather than on the legal principle that it was without authority to award fees, Petitioners' Brief at page 10, such is ill based. In the first place, the argument made in this regard was not advanced by the Petitioners as an argument in support of their Petition. More significantly, it is abundantly clear from the District Court's analysis that, at the bottom line, it did not exercise its discretion to grant fees because it did not believe that it had the authority to do so. Subsequently, upon remand and after receiving direction from the Circuit Court below, the District Court did exercise its discretion and did award fees without delineating any specific reasons why said fees should not be awarded, as Courts have required as a predicate for the negative exercise of discretion in this respect. *Johnson* v. *Highway Express*, *supra* at 488 F.2d 714. In fact, the

As they did before the District and Circuit Courts below, so too herein:

> "Counsel for Gaslight has misstated . . . the obligation of the Division to provide representation to the complainant at any stage of the proceedings before it." Amicus Brief, Appendix C herein at page c6.

Likewise, both District Judge Werker and Circuit Judge Mulligan (dissenting):

> ". . . inadvertently overstated and misconstrued the Human Rights Law, the Division's Rules, and its actual practices." Amicus Brief, Appendix C herein at page c6.

See also: Decision of the Circuit Court below at footnote 9 (Appendix at pages A11-A12) where the Court addressed these propositions, in depth.

CONCLUSION

The judgment of the Circuit Court below should be affirmed in all respects.

Respectfully submitted,

CHARLES E. CARTER, ESQ.
GEORGE E. HAIRSTON, ESQ.
JAMES I. MEYERSON, ESQ.
1790 Broadway—10th Floor
New York, New York 10019
(212) 245-2100
Counsel for Respondent

By: .....

On the Brief:

JAMES I. MEYERSON, ESQ.

Court, in analyzing the fee application upon remand, found that "Plaintiff's attorney has satisfactorily documented the *necessity* and reasonableness" of the efforts undertaken and time expended. Emphasis added. Appendix E herein at pages E2-E3 (Order Upon Remand Awarding fees).

Appendices

APPENDIX "A"

Complaint

BEFORE THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NEW YORK REGIONAL OFFICE

CIDNI CAREY,

Petitioner

VS

THE GASLIGHT CLUB,

Respondent

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1. CIDNI CAREY is a Black woman who resides at 61-25 98th Street, Rego Park, Queens, New York 11374.

2. The GASLIGHT CLUB is believed to be a corporate entity authorized to do, and in fact doing, business in the State of New York. It is located at 124 East 56th Street, New York, New York.

3. On Monday, August 26, 1974, the Petitioner went to the Gaslight Club to apply for a job as a waitress.

4. The Gaslight Club is believed to be an exclusive membership club which provides food, beverage and entertainment for its members.

5. Prior to appearing at the Gaslight Club, the Petitioner called first to make sure that positions were open.

6. She spoke with an individual on the telephone and was asked several questions about herself. Thereafter, she was asked to come to the Club for an interview.

Appendix A

The Petitioner was interviewed by Mr. Ray Angelic, one of the Club managers, the other being Mr. John Anderson.

8. Both Mr. Anderson and Mr. Angelic are white and are still believed to be the managers of said Club.

9. The Petitioner was told that she had all of the qualification for the position but she was not given the job.

10. On the other hand, a white man who was applying for the same position was given the job.

11. It is believed that the Gaslight Club did not hire its first Black waitress until March, 1971.

12. It is believed that when the Petitioner applied for the position of waitress in August, 1974, the Gaslight Club did not have any Black waitresses in its employ; and it is believed that the same condition still exists.

13. It is believed that there are very few Black persons, male or female, employed by the Gaslight Club.

14. The Petitioner believes that she was discriminated against in employment opportunity by the Gaslight Club because she is a Black woman.

WHEREFORE, the Petitioner respectfully prays that the Equal Employment Opportunity Commission assume jurisdiction of this matter and make an appropirate determination after investigation of the Complaint.

Respectfully submitted,

/s/ CIDNI CAREY
Cidni Carey

Appendix A

AFFIDAVIT

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

CIDNI CAREY, being first duly sworn, deposes and says:

1. I am the Petitioner in the foregoing Complaint.

2. I have prepared the same with the assistance of James I. Meyerson, Esq., N.A.A.C.P., 1790 Broadway, New York, New York 10019, (212) 245-2100.

3. I believe the contents of the Complaint to be true except for things things stated upon information and belief and as to those things I believe them to be true.

Respectfully submitted,

/s/ CIDNI CAREY
Cidni Carey

Sworn to and subscribed before me
this 9th day of January, 1975.

/s/ MABEL D. SMITH
Notary Public

MABEL D. SMITH
Notary Public, State of New York
No. 31-4517944
Qualified in New York County
Commission Expires March 30, 1976

Appendix A

Determination

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Charge No. TNY 6-1075

Cidni Carey
61-25 98th Street
Rego Park, New York 11374

Charging Party

The New York Gaslight Club, Inc.
124 East 56th Street
New York, New York 10022

Respondent

DETERMINATION

Under the authority vested in me by Section 29 CFR 1601.19b(d) of the Commission's Procedural Regulations (September 27, 1972), I issue, on behalf of the Commission, the following Determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII of the Civil Rights Act of 1964, as amended, and the timeliness, deferral, and all other jurisdictional requirements have been met. The New York State Division of Human Rights found probable cause to believe that the New York State Human Rights law has been violated.

The Charging Party alleges that the Respondent discriminated against her by denying her employment because of her race, in violation of Title VII of the Civil Rights Act of 1964, as amended.

Appendix A

Having examined the entire record, including all relevant evidence, I conclude that there is reasonable cause to believe that Title VII of the Civil Rights Act of 1964, as amended, has been violated in the manner alleged. The evidence supports the charge.

Having determined that there is reasonable cause to believe that Respondent has engaged in unlawful employment practices, the Commission now invites the parties to join with it in a collective effort toward a just resolution of the matter. The parties may indicate their willingness to enter into settlement discussion by completing the enclosed invitation and returning it to this office in the self-addressed envelope within ten (10) days of receipt of this letter.

20 DEC 1976

.....

Date

Enclosure
Invitation to Participate in
Settlement Discussions

FOR THE COMMISSION

/s/ ARTHUR W. STERN
Arthur W. Stern
District Director

Appendix A

Invitation to Participate in Settlement Discussions

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Section 706(b) of Title VII, Civil Rights Act of 1964, as amended, requires that when the Commission determines there is a reasonable cause to believe the charge is true, it shall endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliations, and persuasion. This invitation is being issued to both parties to determine their willingness to engage in such settlement discussions. If either party declines discussion, or the Commission is unable to secure an acceptable settlement, the District Director shall inform both parties, in writing, of alternatives for obtaining relief available to the Charging Party(ies) and the Commission.

Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned.

Date December 20, 1976 Charge Number TNY 6-1075

Please Complete the Following Information and Return to EEOC in Attached Self-Addressed Envelope

To:

Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Rm. 1301
New York, New York 10007

Appendix A

From:

(Name and address of charging party or respondent)

Cidni Carey
61-25 98th Street
Rego Park, New York 11374

I ☐ Will ☐ Will not Engage in Settlement Discussions.

Suggested

Date

Time

Location

Comments

Date

Typed Name of Charging Party/Respondent

Telephone Number Where Signee Can Be Reached

Signature

FORM
EEOC DEC 72 153

Appendix A

Invitation to Participate in Settlement Discussions

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

INVITATION TO PARTICIPATE IN SETTLEMENT DISCUSSIONS

Section 706(b) of Title VII, Civil Rights Act of 1964, as amended, requires that when the Commission determines there is a reasonable cause to believe the charge is true, it shall endeavor to eliminate the alleged unawful employment practice by informal methods of conference, conciliations, and persuasion. This invitation is being issued to both parties to determine their willingness to engage in such settlement discussions. If either party declines discussion, or the Commission is unable to secure an acceptable settlement, the District Director shall inform both parties, in writing, of alternatives for obtaining relief available to the Charging Party(ies) and the Commission.

Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned.

Date December 20, 1976 Charge Number TNY 6-1075

Please Complete the Following Information and Return to EEOC in Attached Self-Addressed Envelope

To:

Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Rm. 1301
New York, New York 10007

Appendix A

From:

(Name and address of charging party or respondent)

Cidni Carey
61-25 98th Street
Rego Park, New York 11374

I ☒ Will ☐ Will not Engage in Settlement Discussions.

Suggested

Date

Time

Location

Comments

Date
12-29-76

Typed Name of Charging Party/Respondent
Cidni Carey

Telephone Number Where Signee Can Be Reached
212-271-8414

Signature
Cidni Carey

FORM
EEOC DEC 72 153

Appendix A

Right to Sue Letter

(July 13, 1977)

013367
JUL 25 REC'D

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

NEW YORK DISTRICT OFFICE
90 CHURCH STREET, ROOM 1301
NEW YORK, NEW YORK 10007
264-7161

JUL 13 1977

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Ms. Cidni Carey
61-25 98th Street
Rego Park, New York 11374

Re: Carey v. New York Gaslight Club
Charge No. 021-76-1075

Dear Ms. Carey:

After due consideration, the Commission has decided not to litigate the above referenced matter. In view of this decision we are, hereby, enclosing a Conciliation Failure Notice of Right to Sue for you to commence legal action on your own.

It is imperative that you realize you have only 90 days within which to file in the proper federal district court.

Appendix A

It is advisable, however, that the services of an attorney experienced in such matters be obtained. If you have any problems in this regard, please contact me, (212) 264-7161, and I shall endeavor to find one for you.

If you have any question or need further assistant in this matter, please contact me.

Yours truly,

/s/ RALPH MUNOZ
Ralph Munoz
District Counsel

Enclosure:

As stated above.

Appendix A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CONCILIATION FAILURE
NOTICE OF RIGHT TO SUE

To:
Ms. Cidni Carey
61-25 98th Street
Rego Park, New York 11374

From:

Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

EEOC Representative
Ralph Munoz, District Counsel

Telephone Number
264-7167

Case/Charge Number
021-76-1075

The Commission has found reasonable cause to believe your charge of employment discrimination is true but has not entered into a conciliation agreement to which you would have been a party because attempts to achieve such a voluntary settlement with the respondent(s) have been unsuccessful.

The Commission has determined that it will not bring a civil action against the respondent(s) based on your charge and accordingly is issuing you this Notice of Right to Sue. The issuance of this Notice terminates the Commission's processing of your charge, except that the Commission

Appendix A

may seek status as intervenor if you decide to sue on your own behalf as decribed below.

If you want to pursue your charge further, you have the right to sue the respondent named in this case in the United States District Court for the area where you live.* IF YOU DECIDE TO SUE, YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

If you do not have a lawyer or are unable to obtain the services of a lawyer take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

You have a right to inspect and to copy information contained in the Commission's case file for use in a public court proceeding if you decide to sue. If you want to inspect this material, need help in filing your case in court, or have any questions about your legal rights, contact the EEOC representative named above.

An information copy of this Notice has been sent to the respondent(s) named in your case.

(Illegible Signature)
(Authorized EEOC Official)

cc: The New York Gaslight Club, Inc.
124 East 56th Street
New York, New York 10022

To: *(Respondent)*

*RESPONDENT IS LOCATED.

APPENDIX "B"

Affidavit of James I. Meyerson with Attachments

IN THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK
CIVIL No. 77 Civ 4794

JUDGE HENRY WERKER
MS. CIDNI CAREY,

Plaintiff

VS

NEW YORK GASLIGHT CLUB, INC., *et al.*

AFFIDAVIT

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

James I. Meyerson, being first duly sworn, deposes and says:

1. I am one of the attorneys for the Plaintiff herein; and I execute this Affidavit in that capacity.

2. I have been primarily (almost solely) responsible for all of the representation of the Plaintiff herein and through the state administrative and judicial proceedings that heretofore have transpired.

Appendix B

3. I assert the facts and information set forth herein based on facts, information, and belief which I have secured as a consequence of my representation of the Plaintiff in this proceeding and in all other proceedings attendant thereto.

4. On or about August 27, 1974, the Plaintiff, a Black American citizen, did seek a waitress position in and with the Defendant New York Gaslight Club, Inc. After auditioning and otherwise being interviewed, the Plaintiff was advised that there was no position available.

5. Believing that she was denied a position as a waitress in and with the Defendant New York Gaslight Club, Inc., because of her race and color, the Plaintiff did file a complaint with the New York District Office of the Equal Employment Opportunity Commission on or about January 9, 1975.

6. On January 24, 1975, the District Office of the Equal Employment Opportunity Commission did advise the Plaintiff's counsel that a complaint on behalf of the Plaintiff herein had been received by the office and accepted. A copy of said letter is attached hereto and made part hereof.

7. On January 28, 1975, the New York State Division of Human Rights did advise the Plaintiff that, pursuant to the provision of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000 (e)-5(c)), her complaint to the Equal Employment Opportunity Commission had been referred to said Division of Human Rights. It requested that the Plaintiff visit a particular office of the State Division within sixty (60) days for the purpose of filing a complaint

with said Division. A copy of said letter of advisement is attached hereto and made part hereof.

8. On February 21, 1975, the Plaintiff did file a verified complaint with the New York State Division of Human rights charging the Defendant New York Gaslight Club, Inc. and two of its employees (Ray Angelic and John Anderson, both of whom were in management positions) with discriminating against her by refusing to hire her because of her race and color (in substance the same charge which she brought against the New York Gaslight Club, Inc. and the two named individuals in the Equal Employment Opportunity Commission).

9. After investigation, the New York State Division of Human Rights found jurisdiction and probable cause to believe that the Defendants herein (as well as Ray Angelic who is not named herein) had engaged in an unlawful discriminatory practice.

10. Conciliation efforts failed and the case was recommended for public hearing (pursuant to the Rules and Regulations of the New York State Division of Human Rights).

11. On May 20, 1975, the Plaintiff's counsel did write to the New York District Office of the Equal Employment Opportunity Commission advising said Office that the Plaintiff herein was proceeding ahead in the State Division of Human Rights, per the referral and deferral by the Equal Employment Opportunity Commission to said State agency, and inquiring of the status of the matter before said Equal Employment Opportunity Commission. A copy of said letter is attached hereto and made part hereof.

12. On May 22, 1975, the New York District Office of the Equal Employment Opportunity Commission did respond to the foregoing letter and did indicate that, as soon as it was possible, an investigator would be assigned to the Plaintiff's matter and that she would be advised relative to the same. A copy of said letter is attached hereto and made part hereof.

13. From that correspondence, Plaintiff and her counsel assumed that there was an implicit advisement therein that the Equal Employment Opportunity Commission had reassumed jurisdiction of the matter and that dual jurisdiction existed.

14. Thereafter, upon due notice to all parties, the matter came on for hearing before the New York State Division of Human Rights, the Honorable Norman Mednick presiding as the duly appointed Hearing Examiner. Said proceedings commenced on September 22, 1975 and were continued to and concluded on January 15, 1976.

15. The Plaintiff herein was represented by James I. Meyerson, Esq., George E. Hairston, Esq., and Nathaniel R. Jones, Esq., all of whom represent the Plaintiff in the proceedings before this Court. James I. Meyerson, Esq., was almost solely responsible for the prosecution and preparation of the state administrative and judicial proceedings, on behalf of the Plaintiff herein; and he is solely responsible for the efforts before this Court.

16. The Defendants attorney herein also represented them as Respondents in the New York State Division of Human Rights and the subsequent administrative and judicial proceedings attendant thereto.

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17. On August 13, 1976, the New York State Division of Human Rights did issue an order relative to this matter. A copy of the same is attached hereto and made part hereof.

18. The Division found that the New York Gaslight Club, Inc. and John Anderson (named Defendants herein) had discriminated against the Plaintiff because of her race and color and in violation of the Human Rights Law of the State of New York. The Division also concluded that Ray Angelic had not discriminated against the Plaintiff and dismissed the Complaint as against him.

19. Relying upon the same, the New York State Division of Human Rights directed the New York Gaslight Club, Inc. to offer the Plaintiff a position as a waitress and to otherwise pay over to her a sum of money (computed according to a formula set forth in the Order) as a back pay award.

20. On or about August 20, 1976, the Defendant New York Gaslight Club, Inc. did file a Notice of Appeal from the afore-mentioned decision and Order to the New York State Human Rights Appeal Board, an agency independent of the New York State Division of Human Rights.

21. At the same time, the Defendant New York Gaslight Club, Inc. did seek a stay of the operation of the Division decision and Order from the aforementioned Appeal Board; and it did secure the same absolving it from implementing the relief, as set forth, pending the outcome of the appeal therein.

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22. On August 26, 1977, the New York State Human Rights Appeal Board affirmed the findings and determination of the Commissioner of the New York State Division of Human Rights. A copy of said decision is attached hereto and made part hereof.

23. Thereafter, the Defendant New York Gaslight Club, Inc. did file an appeal with the Supreme Court/Appellate Division—First Judicial Department seeking to have the administrative determinations overturned. A stay was secured temporarily absolving said Defendant from implementing the relief, as ordered; and an expedited appeal schedule was set.

24. On November 3, 1977, the Supreme Court/Appellate Division-First Judicial Department did unanimously affirm the administrative determination and the relief ordered therein and based thereon. A copy of said Order is attached hereto and made part hereof.

25. A subsequent Motion for reargument or in the alternative for leave to appeal to the Court of Appeals was denied by the Appellate Division. Said Order was entered by the Appellate Division on January 10, 1978. A copy of said Order is attached hereto and made part hereof.

26. On February 14, 1978, the Court of Appeals of the State of New York did refuse the Defendant New York Gaslight Club, Inc. leave to appeal thereto. A copy of said Order is attached hereto and made part hereof.

27. From May 22, 1975 (when Plaintiff's counsel received a correspondence from the District Office of the Equal

Employment Opportunity Commission in response to a previous inquiry relative to the status of the matter therein) until on or about November 12, 1976 (at which time the matter was pending before the Appeal Board, the New York State Division of Human Rights having determined, at that point, that the Defendant New York Gaslight Club, Inc. was liable to the Plaintiff for discriminating against her—per the Human Rights Law of the State of New York), when counsel for the Plaintiff and a representative of the New York District Office of the Equal Employment Opportunity Commission did speak over the telephone about the status of the proceedings in the State Division of Human Rights, there were no communications between the Plaintiff and the Commission regarding the matter.

28. Subsequent to November 12, 1976 (on or about November 13, 1976), Plaintiff's counsel did forward to the New York District Office of the Equal Employment Opportunity Commission copies of the briefs and memoranda submitted by the various parties to the proceedings to the New York State Human Rights Appeal Board. A copy of the cover correspondence relative thereto is attached hereto and made part hereof.

29. On July 13, 1977 (or thereabouts), the Plaintiff did receive a letter from the District Office of the Equal Employment Opportunity Commission (in New York) notifying her that the Commission had decided not to litigate her matter (having found probable cause) and enclosing herein a Notice of Right to Sue Letter. A copy of said correspondence and the attachment thereto are attached hereto and made part hereof.

30. Thereafter and within the mandated ninety (90) day period, the Plaintiff did file this federal action (pursuant to Title VII of the Civil Rights Act of 1964 as well as pursuant to the Civil Rights Act of 1866).

31. Plaintiff's counsel is unaware of any investigatory and/or conciliatory action taken by the Equal Employment Opportunity Commission in this matter once the matter was initially deferred and referred to the New York State Division of Human Rights, pursuant to 42 U.S.C. Section 2000 (e)-5(c), and notwithstanding that the Commission apparently reassumed jurisdiction over the matter subsequent thereto (per a legal obligation and responsibility to the Plaintiff herein).

32. Plaintiff never requested a Notice of Right to Sue Letter from the Equal Employment Opportunity Commission. In point of fact, Plaintiff never requested that the Equal Employment Opportunity Commission reassume jurisdiction over this matter pursuant to Title VII provisions and subsequent to the initial deferral and referral.

33. In point of fact, the Plaintiff elected to continue in the State Division of Human Rights pursuant to the deferral thereto by the Equal Employment Opportunity Commission and in view of the fact that the proceedings had commenced therein with reasonable dispatch (at least, initially), notwithstanding that the Plaintiff could have elected to request the Equal Employment Opportunity Commission to reassume jurisdiction sixty (60) days af-

ter the deferral and referral and, presumably, any time thereafter.

Respectfully submitted,

.....

JAMES I. MEYERSON, ESQ.
N.A.A.C.P.-1790 Broadway
New York, New York 10019
(212) 245-2100
Attorney for Plaintiff

By: /s/ JAMES I. MEYERSON

Sworn to and subscribed before me
this 14th day of April, 1978.
/s/ MABEL D. SMITH
Notary Public

My Commission Expires:

MABEL D. SMITH
Notary Public, State of New York
No. 31-4517944
Qualified in New York County
Commission Expires March 30, 1980

Letter Dated January 24, 1975

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE

90 Church Street, Room 1301
New York, New York 10007
264-7161

January 24, 1975

James I. Meyerson
Asst. General Counsel
NAACP Special Contribution Fund
1790 Broadway
New York, New York 10019

Re: Your letter of 1/9/75

Dear Sir:

We have received and accepted the charge of discrimination filed by Ms. Cidni Carey against The Gaslight Club.

We have sent her a letter of acknowledgement and a charge to fill out and return to us.

Sincerely,

/s/ FRANK PATTERSON
Frank Patterson
Supervisor Case Control

Appendix B

Letter dated January 28, 1975

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS
270 Broadway, New York, N.Y. 10007

January 28, 1975

Ms. Cidni Carey
61-25 98th Street
Rego Park, N.Y. 11374

RE: Your Complaint Against
Gaslight Club

Dear Ms. Carey,

A copy of your letter to the Equal Employment Opportunity Commission has been referred to our attention, in accordance with the provisions of the Civil Rights Act of 1964.

The New York State Human Rights Law confers jurisdiction upon this Division to receive and pass upon complaints alleging discrimination in employment because of age, race, creed, color, national origin or sex.

I am referring your correspondence to the attention of the following person and office:

Mr. C. Brown, Regional Dir. OR Mr. J. Lind, Regional Dir. 163 W. 125th St., N.Y., N.Y. 89-14 Sutphin Blvd., Jamaica, N.Y. 2nd floor.

You are invited to visit this office of the Division which is open Monday through Friday from 9 AM to 5 PM.

It is requested that you file a complaint with this Division within 60 days. If you do not respond to this com-

Appendix B

munication within that period of time, the Equal Employment Opportunity Commission will be so notified.

Very truly yours,

/s/ SOL COHEN
Supervisor, Case Control Unit

SC/hm

CC: James I. Meyerson, Esq.
NAACP—Special Contribution Fund
1790 Broadway
New York, N.Y. 10019

Appendix B

Letter dated May 20, 1975

Mr. Frank Patterson
Supervisor Case Control
Equal Employment Opportunity Commission
New York District Office
90 Church Street
New York, New York 10007

Re: Carey vs Gaslight Club

Dear Mr. Patterson:

In January, 1975, a complaint encaptioned as above, was filed in your office and thereafter referred to the New York State Division of Human Rights.

The matter is proceeding ahead in the Division; but I am requesting that your office reassume jurisdiction herein so that, should it be necessary, we can obtain a Right to Sue letter at an appropriate time in the future.

I would appreciate confirmation of the same. Thank you for your consideration and attention herein.

Sincerely yours,

James I. Meyerson
Assistant General Counsel
ATTORNEY FOR COMPLAINANT
CIDNI CAREY

JIM:lm

cc: Ms. Cidni Carey

Appendix B

Letter dated May 22, 1975

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
90 CHURCH STREET, ROOM 1301
NEW YORK, NEW YORK 10007

May 22, 1975

NAACP Special Contribution Fund
1790 Broadway
New York, N.Y. 10019

Attn: James I. Meyerson Atty

Re: Your letter of 5/20/75
TNY 5-0458 Carey vs. Gas Light Club

Dear Sir:

This is in response to your recent inquiry on the status of your complaint which you sent to this agency.

As soon as we are able we will assign an investigator to your charge and the investigator will contact you to inform you that the investigation is under way.

Thank you for your trust and confidence, I remain.

Sincerely,

/s/ ARTHUR W. STERN
Arthur W. Stern
District Director

Appendix B

Letter dated November 13, 1976

NAACP Special Contribution Fund
1790 Broadway / New York, N. Y. 10019 / 245-2100

November 13, 1976

Mr. Frank Patterson
Equal Employment Opportunity
Commission
New York District Office
90 Church Street
Room #1301
New York, New York 10007

Re: Carey vs Gaslight Club, etc., et al.

Dear Mr. Patterson:

Pursuant to our telephone conversation on Friday, November 12, 1976, please find enclosed herein copies of some briefs (memoranda) submitted in the above-captioned matter to the Appeal Board of the New York State Division of Human Rights.

Thank you for your attention and consideration herein.

Sincerely yours,

/s/ James I. Meyerson
James I. Meyerson
Attorney for Complainant

JIM/

enclosures

copy: Ms. Cidni Carey

Appendix B

Order of Appellate Division of Supreme Court dated November 3, 1977

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 3, 1977.

Present:

Hon. Theodore R. Kupferman,

Justice Presiding,

Hon. Samuel J. Silverman,
Hon. Myles J. Lane,
Hon. Arthur Markewich,

Justices.

1170

[M-3558; M-3559]

The New York Gaslight Club, Inc.,

Petitioner,

—against—

New York State Human Rights Appeal Board on the complaint of Cidni Carey and Cidni Carey,

Respondents.

The above-named petitioner having presented a petition to this Court praying for an order, pursuant to Section 298 of the Executive Law, reversing the determination of the State Human Rights Appeal Board dated August 26, 1977,

which affirmed an order of the State Division of Human Rights dated August 13, 1976,

And respondents State Division of Human Rights and Cidni Carey each having interposed an answer to said petition,

And respondent State Division of Human Rights having cross-petitioned for an order, pursuant to Section 298 of the Executive Law, enforcing the order of the State Division of Human Rights dated August 13, 1976, as affirmed by order of the State Human Rights Appeal Board dated August 26, 1977, and directing petitioner to comply therewith,

Now, upon reading and filing the notice of application, with proof of due service thereof, and the petition of The New York Gaslight Club, Inc., verified September 7, 1977, and the memoranda of Kane, Kessler, Proujansky, Preiss & Permutt, P.C., all read in support of the petition; the answer of the State Division of Human Rights, verified September 21, 1977, and the memorandum of Sara Toll East, the answer of Cidni Carey dated September 26, 1977, and the affidavit and memorandum of James I. Meyerson, all read in opposition to the petition; and the notice of cross-application, with proof of due service thereof, and the cross-petition of The State Division of Human Rights to enforce its order dated August 13, 1976; and after hearing Kane, Kessler, Proujansky, Preiss & Permutt, P.C. for the petition, Sara Toll East opposed to the petition and for the cross-petition, and Mr. James I. Meyerson opposed to the petition; and due deliberation having been had thereon,

It is unanimously ordered that the determination of the State Human Rights Appeals Board, dated August 26,

1977, be and the same hereby is confirmed, without costs and without disbursements; and the cross-petition of The State Division of Human Rights to direct petitioner to comply with its order be and the same hereby is granted, without costs and without disbursements.

ENTER:

JOSEPH J. LUCCHI
Clerk

Appendix B

Order of Appellate Division of Supreme Court dated January 10, 1978

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on January 10, 1978.

Present:

HON. THEODORE R. KUPFERMAN,

Justice Presiding,

HON. SAMUEL J. SILVERMAN
HON. MYLES J. LANE
HON. ARTHUR MARKEWICH,

Justices.

M-3932

THE NEW YORK GASLIGHT CLUB, INC.,

Petitioner,

—against—

NEW YORK STATE HUMAN RIGHTS APPEAL BOARD on the complaint of CIDNI CAREY and CIDNI CAREY,

Respondents.

The above named petitioner having moved for leave to reargue its petition seeking to review a determination of the respondent dated August 26, 1977, which determination was unanimously confirmed by order of this Court entered on November 3, 1977 or, in the alternative, for leave to

Appendix B

appeal to the Court of Appeals and for a stay of all proceedings,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Albert N. Proujansky in support of said motion, and the affidavit of Sara Toll East and the statement of James I. Meyerson in opposition thereto, and after hearing Mr. Albert N. Proujansky for the motion, and Sara Toll East and Mr. James I. Meyerson opposed,

It is ordered that said motion be and the same is hereby denied in all respects with $20 costs.

ENTER:

JOSEPH J. LUCCHI
Clerk

Appendix B

Order of the New York State Court of Appeals dated February 14, 1978

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourteenth day of February A.D. 1978

Present,

HON. CHARLES D. BREITEL,

Chief Judge, presiding.

Mo. No. 118

In the Matter of

THE NEW YORK GASLIGHT CLUB, INC.,

Appellant,

vs.

NEW YORK STATE HUMAN RIGHTS APPEALS BOARD, on the Complaint of CIDNI CAREY, and CIDNI CAREY,

Respondents.

A motion for leave to appeal and for a stay to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

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ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

APPENDIX "C"

Brief, Amicus Curiae, New York State Division of Human Rights (In Circuit Court Below)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MS. CIDNI CAREY,

Plaintiff-Appellant,

VS.

NEW YORK GASLIGHT CLUB, INC., and JOHN ANDERSON, Manager of the New York Gaslight Club, Inc.,

Defendants-Appellees.

APPEAL FROM MEMORANDUM AND DECISION (AND SUBSEQUENT ORDER RELATIVE THERETO) OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT OF INTEREST

The New York State Division of Human Rights (hereinafter "the Division") is the nation's oldest fair employment practices commission. It was created in 1945 in exercise of the State's police power for the protection of the public welfare, health and peace of the people of the State of New York, and in fulfillment of the provisions of the Constitution of this State concerning civil rights.

The Division has developed procedures for carrying out its functions under the law, to eliminate unlawful discrimi-

natory practices. It is the argument of the Division that the District Court erroneously interpreted the Human Rights Law and the Division's procedures thereunder. The interest of the Division herein is that the Court has before it an accurate account of the law, the Division's rules, and the actual facts of practice, with which the parties to this action are not necessarily knowledgeable.

STATEMENT OF THE BACKGROUND IN THE STATE DIVISION OF HUMAN RIGHTS

In January 1975, Appellant (hereinafter Carey) filed a complaint with the Federal Equal Employment Opportunity Commission (hereinafter EEOC) charging Appellee New York Gaslight Club, Inc. (hereinafter Gaslight) with an unlawful employment practice. Pursuant to Section 706 of Title VII of the Civil Rights Act of 1964 and to a contract with the Division the EEOC deferred the charge to the Division. The Division proceeded to act upon the charge pursuant to Section 297 of the New York State Human Rights Law, N.Y. Executive Law Art. 15 (McKinney's Vol. 18), by investigation, finding and determination of probable cause, and public hearing. An order favorable to Carey was issued after hearing, which, upon appeal, HRL Sections 297-a and 298, was affirmed by the State Human Rights Appeal Board and the Appellate Division of the Supreme Court. *N.Y. Gaslight Club* v. *S.D.H.R.*, 59 A.D.2d 852 (1st Dept. 1977). Leave to appeal was denied by the New York Court of Appeals. 43 N.Y.2d 951 (1978). Counsel fees to Carey's attorney, who participated at all stages of the proceeding from investigation through final appeal, were not awarded. See *S.D.H.R.* v. *Gorton,* 32 A.D.2d 933 (2nd Dept. 1969); mot. to dis. app. den. 25 N.Y.2d 680 (1969).

Carey, having previously obtained a right to sue letter from the EEOC, then filed an action in the Southern District Court to recover counsel fees. This action was dismissed by Judge Werker, in a decision which discusses the State Human Rights Law.

ARGUMENT

I.

The Law, Rules, and Practice of the State Division of Human Rights Reveal a Fundamental Distinction Between the Roles of Private Counsel for the Complainants and the Role of the Division Attorney.

Section 297 of the Human Rights Law sets forth the procedure to be followed in processing a complaint under the law. Subdivision 1 provides for the filing of a complaint which may be filed by an individual "or his attorney-at-law." Subdivision 2 provides for the investigation of the complaint; subdivision 3 provides for conciliation, and subdivision 4 provides the procedures for public hearing. Section 297-a establishes the State Human Rights Appeal Board, which, in subdivision 6, has the power "to hear appeals by any party to any proceeding before the Division from all orders of the Commissioner***." Section 298 provides for judicial review and enforcement in the Appellate Division of the New York Supreme Court. These various sections contain references to the Division attorney only as follows:

> "The case in support of the complaint shall be presented by one of the attorneys or agents of the division and, at the option of the complainant, by his attorney. With the consent of the division, the case in support of the complainant may be presented solely by his attorney." HRL § 297.4.a.
>
> "The Division may appear in court by one of its attorneys." HRL § 298.

The provision obviates appearance by the Attorney General of the State of New York on behalf of the Division. See N.Y. Executive Law, Section 63.

Section 295 of the Human Rights Law, listing the general powers and duties of the Division, includes in subdivision 5 thereof the power "[T]o adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of this article, and the policies and practice of the division in connection therewith."

Rules were duly promulgated pursuant to this power, and were duly filed with the New York Secretary of State for publication in the Official Compilation of Codes, Rules and Regulations of the State of New York, equivalent to the Code of Federal Regulations, and which has the force and effect of law. (9 N.Y.C.R.R. § 465 et seq.) volume A-1; CCH Employment Practice Guide § 26075, pp. 8910 et seq.

Rule 456.6 refers to the investigation of a complaint (pursuant to Section 297.2 of the Law) by "the Regional Director . . . with the assistance of staff." Conciliation under Rule 465.7 is also left to the Regional Director. Rule 465.11 covers representation by an attorney. Subdivisions (d) and (e) are pertinent herein and are attached hereto for the Court's convenience. These sections reveal that dual representation by the Division attorney and a private attorney representing the complainant is not contemplated except in the unusual case and at the Division's option.

This rule, a 1977 codification of an existing procedure, was designed for two purposes: (1) conservation of the Division attorneys' time in a period of exceptionally heavy case loads and backlogs and (2) clarification of the role of the Division attorney vis-a-vis the complainant. The rules, carrying out the statutory mandate, and the actual procedures of the Division, work in actual practice as follows:

When a complaint is filed and investigated, the Division attorney does not appear except upon a special request made by the Regional Director for the purpose of representing and advising the Regional Director.

The Division is, however, aware that private counsel frequently represent complainants during this stage leading to a finding of probable cause or dismissal for no probable cause. Section 297.2. The finding of probable cause after investigation is a necessary preliminary to the public hearing stage. However, at no time is a complainant represented by a Division attorney at the investigation level.*

At the hearing the Division attorney appears if the complainant has not retained private counsel; if the complainant has retained private counsel the Division attorney appears at the Division's option to protect the public interest.

At the appellate level, the Division attorney appears to support the Division's order and to seek enforcement thereof pursuant to § 298. Here, the Division attorney represents only the Commissioner and the Division. The Division attorneys *cannot* represent a complainant on appeal from an order of the Commissioner adverse to the complainant. Nor can the Division attorney represent a com-

* There is an exception to this procedure when the Division itself, pursuant to its authority under § 297.1, makes a complaint on its own motion. An attorney may be assigned to draft the complaint and to advise the regional staff in the investigation.

plainant whose favorable order after hearing has been reversed by the Appeal Board. Such a situation recently occurred in the case of *Cox* v. *Dept. of Correctional Services,* 61 A.D.2d 25 (4th Dist. 1978). The Division cannot appeal from an order of the State Human Rights Appeal Board. *SDHR* v. *Niagara Mohawk-Power Corp.,* —— A.D. 2d —— (4th Dept. 9-15-78) mot. for lv. to. app. den. —— N.Y.2d —— (N.Y.L.J. 12-4-78, P. 7 col. 2).

Counsel for Gaslight has misstated, in its brief at 21-23, the obligation of the Division to provide representation to the complainant at any stage of the proceedings before it. Likewise Judge Werker's holding that "The plaintiff had the option of pursuing her state administrative remedies without incurring any expenses at all for legal services" inadvertently overstated and misconstrued the Human Rights Law, the Division's Rules, and its actual practices.

II.

The Federal and State Agencies Function in an Integrated Scheme to Enforce the Public Policy of Combatting Discrimination.

The State Division of Human Rights is an official "706 Deferral Agency", under the provisions of the EEOC Rules and Regulations. 29 C.F.R. Part 1601, Section 1601.13. It stands in a contractual relationship with the Federal government under which moneys are received for the processing of those cases which fall within the jurisdiction of both agencies. Thus the State agency has a role, defined by Title CII of the Civil Rights Act of 1964 and refined by its contractual obligations, as seen in Exhibits A, B and C attached to the affidavit of Adele Graham accompanying the motion

for leave to file as amicus curiae, of a participant in an integrated Federal-State scheme.

Filing of a Division complaint is a condition precedent to filing a charge with the EEOC. The Division's jurisdiction is exclusive only for the first 60 days after the complaint is filed. Under the system called "dual filing," a complaint filed with the Division is deemed filed with the EEOC 60 days later, and a charge led with the EEOC is deemed filed with the Division immediately. The statement of Gaslight in its brief at p. 10 is therefore erroneous. At the time the Carey complaint was filed in 1975, the procedure was otherwise; that is, complaints were originally filed with the EEOC which then literally deferred them by notifying the State agency of the filing of the charge. The State agency was then required to notify the charging party of the necessity to come in to the State agency to file a complaint. Thus the 1975 contract (Ex. C) refers to the resolution by the State of "jointly filed charges" "consistent with an ongoing cooperative effort" and "an efficient division of work between said District office and the contractor."

Likewise the 1978 Worksharing Agreement (Ex. B) "in recognition of the common jurisdiction and goals", was intended to "integrate the charge processing procedures and reduce duplication of effort by sharing primary responsibility * * "(Ex. B p. 2).

Furthermore, the Memorandum of Understanding of June 8, 1976 (Ex. A) (an earlier version of the Worksharing Agreement) states:

> "In recognition of the common jurisdiction and goals of the two agencies and to provide an efficient procedure whereby individuals may invoke the full panoply of procedures and remedies available under the relevant

> state and federal laws, and Division and the Commission have endeavored to inform complainants/charging parties of their rights under both state and federal law, and have encouraged and assisted such individuals in filing with the other agency."

CONCLUSION

THE ROLE OF PRIVATE COUNSEL TO A COMPLAINANT UNDER THE HUMAN RIGHTS LAW IS DISTINGUISHABLE FROM THE ROLE OF AN ATTORNEY EMPLOYED BY THE STATE DIVISION OF HUMAN RIGHTS.

Respectfully submitted,

ANN THACHER ANDERSON
General Counsel
Attorney for Amicus Curiae
State Division of Human Rights

/s/ ADELE GRAHAM
By.....
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APPENDIX "D"

Answer of Petitioners in District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE

No. 77 CIV. 4794

MS. CIDNI CAREY,

Plaintiff,

—against—

NEW YORK GASLIGHT CLUB, INC. and JOHN ANDERSON,
Manager of the New York Gaslight Club, Inc.,

Defendants.

ANSWER

Defendant, New York Gaslight Club, Inc., in answer to the plaintiff's complaint, respectfully alleges:

1. Denies each and every allegation contained in the paragraphs of plaintiff's complaint designated as "5", "11", "16" and "18".

2. Denies knowledge or information sufficient to form a belief as to the allegations contained in the paragraphs of plaintiff's complaint designated as "6", "7", "8", "9" and "17".

As and for a First Affirmative Defense

3. That proceedings are pending for the same relief sought in this action in a proceeding in the Supreme Court of the State of New York.

Appendix D

As and for a Second Affirmative Defense

4. That the plaintiff was not hired by the defendant, the New York Gaslight Club, Inc. for reasons other than racial discrimination.

As and for a Third Affirmative Defense

5. That the plaintiff has not instituted this action within the time limit therefor, as required by the applicable statutes of the United States.

Dated: New York, New York
November 9, 1977

KANE, KESSLER, PROUJANSKY,
PREISS & PERMUTT, P.C.

By ALBERT N. PROUJANSKY
A Member of the Firm
Attorneys for Defendant,
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212-541-6222

To:

JAMES I. MEYERSON, ESQ.
Attorney for Plaintiff
N.A.A.C.P.—1790 Broadway
New York, New York 10019

APPENDIX "E"

Order Upon Remand Awarding Fees

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 4794 (HFW)

MS. CIDNI CAREY,

Plaintiff,

—against—

NEW YORK GASLIGHT CLUB, INC., and JOHN ANDERSON, Manager of the New York Gaslight Club, Inc.,

Defendants.

APPEARANCES:

Attorney for Plaintiff:

CHARLES E. CARTER
GEORGE E. HAIRSTON
JAMES I. MEYERSON
N.A.A.C.P.
1790 Broadway
New York, New York 10019

By: James I. Meyerson

Attorney for Defendant:

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680 Fifth Avenue
New York, New York 10019

By: Albert N. Proujansky

Appendix E

HENRY F. WERKER, D.J.

Plaintiff's attorney seeks an award of counsel fees in the amount of $10,700 representing 107 hours at $100 per hour.

In light of the attorney's experience in civil rights litigation, the proposed rate of $100 per hour is fair and reasonable.

With respect to the number of hours, however, 22 hours are attributable to the attorney's original application for fees, and 25 hours were devoted to the successful appeal of the Court's denial of that application. Although the second circuit has recently ruled that a district judge in his discretion may take into consideration time spent by a plaintiff's attorney establishing the right to an award of fees, *see Gagne* v. *Maher,* 594 F.2d 336, 343-44 (2d Cir. 1979), under the circumstances of this suit, *see generally Carey* v. *New York Gaslight Club, Inc.,* No. 78-7603, slip op. at 2547-56 (2d Cir. May 8, 1979) (Mulligan, J., dissenting), compensation for the time spent litigating the awarding of attorney's fees is unwarranted. Since these 47 hours were not devoted to vindicating the rights of the plaintiff but were spent solely for the benefit of her attorney, I am omitting them from the computation of the award. *Accord, Boe* v. *Collelo,* 447 F. Supp. 607, 610 (S.D. N.Y. 1978); *Kulkarni* v. *Nyquist,* 446 F. Supp. 1274, 1281 (N.D.N.Y. 1977).

The remaining 60 hours represent time spent by plaintiff's attorney drafting pleadings, memoranda and briefs, preparing and presenting evidence to the New York State Human Rights Division, meeting and communicating with counsel for defendant and the State Human Rights Division, and consulting with the plaintiff herself. Plaintiff's

attorney has satisfactorily documented the necessity and reasonableness of this amount of time. Accordingly, the application for attorney's fees is granted to the extent of $6,000 representing 60 hours at $100 per hour.

Submit orders on notice within 10 days after entry of this decision.

SO ORDERED.

Dated: New York, New York
August 3, 1979

/s/ HENRY F. WERKER
U.S.D.J.

FOR ARGUMENT

No. 79-192

In the Supreme Court of the United States

OCTOBER TERM, 1979

NEW YORK GASLIGHT CLUB, INC., ET AL., PETITIONERS

v.

CIDNI CAREY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

OPINIONS BELOW

The opinion of the court of appeals is reported at 598 F. 2d 1253. The opinion of the district court is reported at 458 F. Supp. 79.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1979. The petition for a writ of certiorari was filed August 6, 1979, and was granted October 9, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Respondent filed an employment discrimination claim with the Equal Employment Opportunity Commission, which was referred under statutory procedures to a state

agency for consideration. The state procedures contemplate that claimants will be represented by privately retained attorneys. Before the completion of the state litigation, respondent was required to file suit in federal court to protect her rights under Title VII. The question presented is whether, in these circumstances, respondent is entitled under Title VII to attorney's fees for work performed in the state proceeding.

STATUTES INVOLVED

Section 706(k) of Title VII, Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), provides:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, provides in relevant part:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. 1981-1983, 1985, 1986], * * * the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

INTEREST OF THE UNITED STATES

The Equal Employment Opportunity Commission is the federal agency responsible for administering, interpreting and enforcing federal employment discrimination statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Private employment discrimination suits provide the Commission with

essential assistance in the enforcement process. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). State and local fair employment agencies play an important role in the resolution of employment discrimination complaints, often making it unnecessary for injured parties to resort to the federal courts for relief. *Oscar Mayer & Co.* v. *Evans*, No. 78-275 (May 21, 1979), slip op. 4. Charges of employment discrimination, whether filed with the Equal Employment Opportunity Commission or with state and local fair employment practice agencies, thus constitute a common agenda; the activities of the state agencies are an integral part of the effort to achieve nationwide compliance with Title VII. See Section 5.1, EEOC Compliance Manual. Accordingly, the question whether an injured party can obtain an award of attorney's fees for services rendered during a state fair employment proceeding affects Title VII enforcement.

STATEMENT

In January 1975, respondent Cidni Carey filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that she was refused employment as a waitress by petitioner New York Gaslight Club because of her race (C.A. App. 25a). As required by Section 706(c) of Title VII, 42 U.S.C. 2000e-5(c), her charge was forwarded to the local state fair employment agency—here, the New York State Division of Human Rights (C.A. App. 26a); also in accordance with Section 706(c), the EEOC automatically assumed jurisdiction of the charge sixty days later.

Federal and state proceedings thereafter followed parallel tracks. The New York Division acted first,

beginning its investigation of the charge in March 1975.[1] In May 1975, the New York Division found probable cause to believe that respondent's charge of employment discrimination was true (Opp. App. 25a-26a). Under New York law, after such a determination, the Division directs the employer to answer the charge at an adversarial public hearing before a hearing examiner. N.Y. Exec. Law § 297(4)(a) (McKinney 1972-1978 Supp.). At the hearing "[t]he case in support of the complaint shall be presented by one of the attorneys or agents of the division and, at the option of the complainant, by his attorney." *Ibid.* Because of a growing caseload and staff limitations (Pet. App. A58-A59), complainants at that time were "encouraged" to obtain private counsel so that staff attorneys could work on other matters (Pet. App. A59).[2] That was the procedure followed here. The two-day hearing was held in late 1975 and early 1976; no attorney for the state appeared. "[T]he entire burden of placing evidence into the record, and arguing the significance thereof, was borne by the attorney for the plaintiff" (Pet. App. A59; A. 68).

---

[1]As part of that investigation, respondent appeared at conferences to discuss the possibility of resolving the dispute through conciliation (Opp. App. 25a). Respondent, who was too poor to employ her own attorney, was represented by counsel employed by the NAACP Special Contribution Fund, Inc. (Pet. App. A56; Opp. App. 23a).

[2]On October 9, 1977, Division regulations were amended to provide that:

> If the complainant is represented by an attorney, such attorney shall solely present the case in support of the complaint on the consent of the division attorney. The division attorney shall prepare and submit to the hearing examiner or chief hearing examiner a statement in lieu of appearance together with the jurisdictional papers.

9 N.Y.C.R.R § 465.11.

On August 13, 1976, the hearing examiner found that petitioner discriminated against respondent because she is black (A. 70). Petitioner was ordered to offer respondent employment as a cocktail waitress and to give her back wages at the rate of $52 per week from August 1974, to the date of reinstatement (A. 71).[3]

Petitioner appealed to the State Human Rights Appeal Board,[4] which held a hearing on December 8, 1976 (C.A. App. 38a). Petitioner appeared by counsel, as did the Division and respondent (*ibid.*).

Meanwhile the EEOC district office had conducted its own investigation, in which it gave due weight to the findings of the New York Human Rights Division in accordance with Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b). On December 20, 1976, while the State Appeal Board was considering the appeal from those findings, EEOC determined that there was reasonable cause to believe petitioner had violated Title VII (Resp. Br. App. a4-a5). As required by Title VII (42 U.S.C. 2000e-5(b)), EEOC attempted conciliation, but those efforts failed. After the EEOC General Counsel decided not to sue, administrative processing of the charge ended in July 1977. As required by Section 706(f)(1) of Title VII, EEOC thereupon issued respondent a Notice of Right to Sue, authorizing her to file a Title VII suit (42 U.S.C. 2000e-5(f)(1)). The notice was issued on July 13, 1977 (C.A. App. 15a-16a); respondent had ninety days from her receipt of the notice within which to file her Title VII suit (42 U.S.C. 2000e-5(f)(1)).

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[3]The $52 was based on average wages earned by other waitresses since 1974 (A. 70).

[4]The Board is an independent state agency established to hear appeals from orders of the Commissioner, who heads the Human Rights Division. N.Y. Exec. Law § 297-a (McKinney and 1972-1978 Supp.). A Division attorney appears before the Board to seek enforcement of the Division's order. The Division cannot appeal from the decision of the Board (Opp. App. 17a-18a; Pet. App. A60-A61).

On August 26, 1977, the New York State Human Rights Appeal Board affirmed the order of the Division of Human Rights (C.A. App. 40a-41a). Petitioner immediately appealed the Board's decision to the Appellate Division of the New York Supreme Court (C.A. App. 42a). The Division cross-petitioned for enforcement of its order (*ibid.*).

On September 30, 1977, respondent filed suit in federal district court under the Civil Rights Act of 1866, 42 U.S.C. 1981; Title VII; and the Thirteenth Amendment (A. 29-34).[5] The complaint outlined the events leading to Gaslight's rejection of respondent's application for a job and noted that Gaslight had employed only four blacks of "perhaps thousands" employed as waitresses during the twenty years of its existence (A. 32). The complaint sought a declaratory judgment that petitioner's practices were unlawful under federal law; an order requiring petitioner to hire respondent; back pay, interest, and other benefits she would have obtained had she been hired in 1974; attorney's fees; and unspecified other relief (A. 34). Petitioner's answer denied liability and cited the pendency of the state proceedings as an affirmative defense (Resp. Br. App. d1).

On November 3, 1977, the New York Supreme Court Appellate Division unanimously affirmed the State Appeal Board's determination. *New York Gaslight Club* v. *State Division of Human Rights on the Complaint of Carey*, 59 A.D. 2d 852 (1st Dept. 1977). Petitioner unsuccessfully moved for reargument, and then filed a motion in the New York Court of Appeals for leave to appeal and for a stay of the Division order (Resp. Br. App. b19-b20, b21-b22).

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[5]When the federal suit was filed, more than a month of the 90-day Title VII statute of limitations, and two and a half years of the three-year Section 1981 statute of limitations, had expired. There was no indication that the state proceedings would be promptly resolved.

On February 3, 1978, the district court held a pretrial conference at which petitioner agreed that if the New York Court of Appeals denied its motion for leave to appeal, it would comply with the Division's order (A. 73). One week later, on February 14, 1978, the Court of Appeals denied petitioner's motion. *New York Gaslight Club* v. *State Division of Human Rights on the Complaint of Carey*, 43 N.Y. 2d 951 (1978).

The parties thereupon apparently agreed to settle the federal action, except as to attorney's fees.[6] Filings in the district court thereafter related solely to that issue (A. iii).[7] In July 1978, the district court dismissed respondent's complaint on the ground that the state appeals from the Division order had "been exhausted after the filing of this action," but left the application for attorney's fees pending (A. 35). After further briefing, the

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[6]On February 17, 1978, respondent's counsel wrote the district judge that in light of the Court of Appeals' action,

> it would seem that the federal action could in all likelihood be dismissed. However, it is our considered opinion that, since we were compelled to file the Title VII action while the State proceeding was in process, we are entitled to some attorneys fees, if nothing else (assuming that the action is otherwise dismissed but without committing my client to that position at this time).
>
> I would suggest that this matter be scheduled for a conference before your honor in order to determine where the federal action will go. In the mean time, we will consult with the attorneys for the Defendants in order to be able to advise you [of] our respective positions (some or all of which we may agree upon).

A. 76.

[7]Respondent's counsel asked compensation for 82 hours. Of that time, nine hours were spent in preparing and filing the EEOC charge and federal suit; 22 hours were spent in preparing and presenting the case to the hearing examiner; and 29 hours were spent in defending the determination in respondent's behalf before the Appeals Board and the state courts (Pet. App. A39-A40).

court denied the application for fees without mentioning counsel's time in the federal proceedings, saying that the filing of a federal suit did not entitle an aggrieved party to an award of attorney's fees for work done at the state level (Pet. App. A24-A28; 458 F. Supp. 79).

The court of appeals reversed, one judge dissenting (Pet. App. A1-A23; 598 F. 2d 1253). It held that the language of Section 706(k) allowing attorney's fees to prevailing parties in "any action or proceeding under this subchapter" encompassed awards of counsel fees for work done in connection with state proceedings (Pet. App. A8). The court noted that "[d]eference to state mechanisms for resolving discrimination complaints is an integral part of the enforcement process under Title VII" and that consequently "state human rights agencies play an important role" in achieving the goals of Title VII (Pet. App. A6-A7, A8). The court found that the complainant's "need to retain private counsel at the state administrative stage in a Title VII claim is therefore real"(Pet. App. A11); that an award of attorney's fees would provide an incentive for the development of a thorough administrative record at the early stage of proceedings; and that the denial of an award would encourage needless litigation by prompting complainants to abandon state proceedings for the federal courts (Pet. App. A11-A13).[8]

SUMMARY OF ARGUMENT

As part of the complete remedy afforded by Title VII and 42 U.S.C. 1988 to persons who have been subjected to employment discrimination, attorney's fees should be awarded to a prevailing plaintiff in all but exceptional circumstances. The fact that a part of the fees awarded

[8]On remand the district court awarded respondent $6,000 in attorney's fees (Resp. Br. App. e3). Respondent's back pay award, after taxes, came to $6,500.

here was for work performed in state administrative and judicial proceedings is not an exceptional circumstance making the award inappropriate.

Respondent was required to bring suit in federal court to protect her federal rights when she did not receive timely relief in the state proceedings. When the state proceedings eventually terminated successfully, she settled the federal suit, becoming the prevailing party in that suit, entitled to an award of attorney's fees for all work reasonably necessary to achieve that result. The limited agency staff participation on behalf of the complainant and the quasi-judicial nature of the New York proceedings make it reasonably necessary for an aggrieved party to retain private counsel to protect his interests in those proceedings.

In any event, Title VII requires that a claim of employment discrimination be referred first to an appropriate state agency; the state proceeding is thus an integral part of Title VII's enforcement scheme, and is consequently a "proceeding under this title" for which attorney's fees are available under Section 706(k). Moreover, the availability of attorney's fees for work performed in the state proceedings facilitates the operation of Title VII by encouraging the effective utilization of those proceedings, thus minimizing the need to rely on the supplemental federal remedy and leading to the prompt and effective elimination of employment discrimination.

ARGUMENT

A. RESPONDENT IS ENTITLED TO ATTORNEY'S FEES AS A PREVAILING PLAINTIFF

This Court has emphasized that Title VII is intended to "make persons whole for injuries suffered on account of unlawful employment discrimination," and to provide

"the most complete relief possible." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418, 421 (1975). Accordingly, Congress has instructed the courts, in their discretion, to award the prevailing party attorney's fees in Title VII suits (Section 706(k), 42 U.S.C. 2000e-5(k)). Because Congress has cast a Title VII "plaintiff in the role of 'a "private attorney general," vindicating a policy that Congress considered of the highest priority,' * * * a prevailing plaintiff under Title [VII] 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' " *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 416-417 (1978), citing *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968); *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 415; and *Northcross* v. *Memphis Board of Education*, 412 U.S. 427, 428 (1973).

The identical language in 42 U.S.C. 1988 should be similarly construed. That language was enacted as the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, in swift response to the Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), holding that there could be no awards of attorney's fees under the "private attorney general" concept absent explicit congressional authorization. 421 U.S. at 260-261. This immediate congressional reaction reflected a concern that "[i]f our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976).

The principle that attorney's fees are recoverable "in all but special circumstances" (*Christiansburg Garment Co.* v. *EEOC*, *supra*, 434 U.S. at 417) implements the congressional view, reflected in Title VII, the Civil

Rights Attorney's Fees Awards Act of 1976, and other civil rights acts.[9] that attorney's fee awards are necessary to make it easier for persons of limited means to secure relief from racial discrimination. See 110 Cong. Rec. 12724 (1964) (remarks of Senator Humphrey); S. Rep. No. 94-1011, *supra*, at 2.[10]

No special circumstances making an award of attorney's fees inappropriate exist here.[11] To the contrary, the circumstances of this case make such an award especially appropriate. At the time respondent brought her suit in federal court under Title VII and 42 U.S.C. 1981, she had received no relief in either the state or the federal proceedings. To protect her federal rights, she was required to bring suit in federal court. The EEOC administrative process had ended and she had been issued a notice of right to sue; she had to bring her suit within 90 days after receiving that notice. Similarly,

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[9]Since 1964, every major civil rights law passed by the Congress has included, or has been amended to include, one or more fee provisions. See, *e.g.*, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3612(c); Voting Rights Extension Act of 1975, 42 U.S.C. 1973(*l*)(e); and Emergency School Aid Act, Pub. L. No. 95-561, Section 601(a), 92 Stat. 2266.

[10]Petitioner's suggestion (Pet. 9) that the court of appeals' reasoning would also require the award of attorney's fees to a prevailing defendant is inconsistent with *Christiansburg Garment Co.* v. *EEOC*, *supra*, 434 U.S. at 420-422.

[11]Petitioner's argument (Br. 10-12) that the district court's denial of attorney's fees was simply a reasonable exercise of its discretion ignores the special policy favoring the award of attorney fees to prevailing plaintiffs in discrimination cases. In any event, the question whether the court of appeals should have reviewed the attorney fee award only to determine whether the district court had abused its discretion is not presented in the petition for certiorari, nor is it fairly comprised within the questions presented. See Rule 40(d) of the Rules of this Court.

only four months remained under the statute of limitations applicable to her claims based on Section 1981.[12]

Even after petitioner decided not to litigate further in the state proceedings, respondent could have continued her federal suit. Instead, respondent agreed to settle that suit, forgoing her federal right to additional back pay,[13] interest, and compensatory and punitive damages.[14] At that point, she became the prevailing party in the federal suit.[15] Consequently she is entitled at least to attorney's fees for the preparation of the federal action, the writing and filing of the charge and complaint, attendance at

[12]Nor was the need to file her federal suit the result of too hasty action by the EEOC in issuing the notice of right to sue, as the district court implied (Pet. App. A26). That notice was not issued until after the state administrative proceedings had been concluded, and EEOC had completed its investigation, made a finding of reasonable cause, had unsuccessfully attempted conciliation, and had decided not to sue (see *supra*, page 5).

[13]The $52 per week back pay award was based on 1974-1975 salary levels. Respondent was not offered a job until 1978, when salaries undoubtedly had risen substantially as a result of inflation. In addition, it is not clear whether the $52 included customer tips.

[14]Compensatory and punitive damages are available under Section 1981. See *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975); *Allen* v. *Amalgamated Transit Union Local 788*, 554 F. 2d 876 (8th Cir.), cert. denied, 434 U.S. 891 (1977).

[15]In enacting the Civil Rights Attorney's Fees Awards Act, Congress explicitly stated that "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. No. 94-1011, *supra*, at 5. See *Bonnes* v. *Long*, 599 F. 2d 1316, 1318 (4th Cir. 1979); *Brown* v. *Culpepper*, 559 F. 2d 274, 277 (5th Cir. 1977). The same statutory language in Section 706(k) of Title VII has been similarly interpreted. *Parker* v. *Matthews*, 411 F. Supp. 1059, 1063 (D.D.C. 1976), aff'd *sub nom. Parker* v. *Califano*, 561 F. 2d 320 (D.C. Cir. 1977); but cf. *Pearson* v. *Western Electric Co.*, 542 F. 2d 1150 (10th Cir. 1976).

pretrial conferences, and all other legal work reasonably associated with the federal suit (A. 39-40).[16]

This case thus does not involve a federal suit brought solely to recover attorney's fees for work performed to establish a right granted by state law. Even if an award of attorney's fees might be inappropriate in such circumstances, the court of appeals properly concluded that the district court erred in declining to award such fees in this case.[17]

[16]In their brief, petitioners argue that lawyers for public interest groups should not be compensated by employers found guilty of violating the law. Pet. Br. 11-12. This argument was not raised in the petition, and thus is not properly before this Court. Rule 40(d)(2) of the Rules of this Court. It has, in any event, been frequently rejected by the courts of appeals. *EEOC* v. *Enterprise Association Steamfitters*, 542 F. 2d 579, 592-593 (2d Cir. 1976), cert. denied, 430 U.S. 911 (1977); *Mid-Hudson Legal Services, Inc.* v. *G & U, Inc.*, 578 F. 2d 34, 36-37 (2d Cir. 1978); *Reynolds* v. *Coomey*, 567 F. 2d 1166, 1167 (1st Cir. 1978); *Rodriguez* v. *Taylor*, 569 F. 2d 1231, 1247-1250 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978). See also note 1 of the court of appeals' opinion in this case (Pet. App. A3-A4).

[17]This Court, accordingly, need not consider in this case whether it would be appropriate to award attorney's fees under Title VII or the Attorney's Fees Awards Act in a case in which the federal suit was not filed until after the complainant had obtained her state remedy—the situation in which the district court believed the federal court would be "a procedural conduit through which otherwise unwarranted relief could be obtained" (Pet. App. A27).

B. RESPONDENT IS ENTITLED TO ATTORNEY'S FEES FOR WORK COUNSEL PERFORMED IN STATE PROCEEDINGS IN IMPLEMENTATION OF HER RIGHTS UNDER TITLE VII

1. The State Proceedings Are Proceedings "Under" Title VII Within The Meaning Of Section 706(k)

Under Title VII, a person aggrieved is required to give the state an opportunity to investigate and attempt to resolve the charge, if state procedures are available. *Oscar Mayer & Co.* v. *Evans*, No. 78-275 (May 21, 1979), slip op. 4. Section 706(c), 42 U.S.C. 2000e-5(c), provides that whenever the unlawful employment practice occurs in a state that has a law prohibiting that employment practice, the EEOC must defer to the state for a period of 60 days. See *Love* v. *Pullman Co.*, 404 U.S. 522 (1972).[18] Moreover, Section 706(b), 42 U.S.C. 2000e-5(b), requires that EEOC must give weight, but not controlling effect, to a state administrative determination.

Title VII thus contains an "integrated, multistep enforcement procedure," *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 359 (1977), which requires that state and local agencies have "some opportunity to solve problems of discrimination," *Oscar Mayer & Co.* v. *Evans*, *supra*, slip op. 6, and which anticipates that the state, the aggrieved person, the employer, and the EEOC

[18] In such a state, the aggrieved party must then file a charge with EEOC within 30 days of the termination of state proceedings or within 300 days of the unlawful employment practice, whichever is earlier. Section 706(e), 42 U.S.C. 2000e-5(e). In practice, the Commission automatically assumes concurrent jurisdiction over referred charges after the state has had 60 days of exclusive jurisdiction. See *Love* v. *Pullman Co.*, *supra*, 404 U.S. at 526.

will use the state mechanisms to the fullest extent possible. Senator Clark's comments during the 1964 debates reflect the congressional emphasis on the close relationship between federal and state remedies:

> It is important to note that Title VII is so drafted that the States and the Federal Government can work together. When the bill is enacted, the State and the municipal agencies will continue to operate, and State laws will continue in force, except where they are inconsistent with Title VII.
>
> * * * * *
>
> In addition, the federal Commission can make arrangements to use and pay for the services of State and local agencies in carrying out its duties under the Federal law if the State agencies are willing.
>
> So, I take it that Title VII meshes nicely, logically, and coherently with the State and city legislation already in existence in a number of the States and a number of our cities, small as well as large. The Federal Government and the State governments could cooperate effectively and, to some extent at least, there would be a saving in the Federal budget in those areas where State laws are effective, discrimination is outlawed, and the discriminators are prosecuted.

110 Cong. Rec. 7205 (1964). See also 110 Cong. Rec. 1521 (1964) (Rep. Celler); 110 Cong. Rec. 7386 (1964) (Sen. Young); 110 Cong. Rec. 12721-12722, 12724 (1964) (Sen. Humphrey); 110 Cong. Rec. 12820 (1964) (Sen. Dirksen).

The EEOC, in the spirit of cooperation mandated by Section 709(b), 42 U.S.C. 2000e-8(b), has implemented the "meshing" of federal and state fair employment

programs contemplated by Congress by entering into work-sharing arrangements with most state and local agencies to foster prompt resolution of charges.[19] In sum, state proceedings are an integral part of Title VII's enforcement scheme.

There is no hint in the legislative history of Section 706(k) that it is to be interpreted narrowly to preclude the award of attorney's fees for work performed at the state level after referral of a charge from the EEOC. On the contrary, since Congress mandated state referral and envisaged state cooperation in the federal effort to eliminate employment discrimination—a task which this Court has several times called a matter of the "highest priority"[20]—it would be anomalous to conclude that Congress intended that attorney's fees could be awarded only for part of the legal work necessary, under the scheme of Title VII, to eliminate such discrimination.

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[19]The work-sharing program began in FY 1975. By January 1977, work-sharing agreements had been made with 43 of the 57 state and local fair employment agencies. Center for National Policy Review, *State Agencies and Their Role in Federal Civil Rights Enforcement* 26-27 (1977). More exist today. The agreement with the New York State Division of Human Rights is typical. Under that agreement, EEOC and the Division agree that the Division will process a certain number of charges for a set fee. The EEOC refers charges falling in a designated category to the Division and takes no further action until the Division issues its final findings and orders. Once the Division has processed a charge, EEOC review of the Division's action accords substantial weight to the final findings and order of the Division. Section 706(b), 42 U.S.C. 2000e-5(b); Section 5.5, EEOC Compliance Manual.

[20]*Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 47; *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 415; *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 763 (1976); *Christiansburg Garment Co.* v. *EEOC*, *supra*, 434 U.S. at 416-417.

The reasoning of the dissent below, however, would lead to precisely that anomaly. Its conclusion that "remuneration of private counsel successful in state agency and state judicial proceedings in vindicating rights under state law should be determined by the law of the state" (Pet. App. A16) overlooks the fact that a primary purpose of Title VII was to supplement available state remedies for employment discrimination. That is why there is a need for federal-state collaboration, and why EEOC has the authority to evaluate state remedial action under Section 706(b), 42 U.S.C. 2000e-5(b). See, *e.g.*, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *Voutsis* v. *Union Carbide Corp.*, 452 F. 2d 889 (2d Cir. 1971), cert. denied, 406 U.S. 918 (1972). Since the awarding of attorney's fees is necessary to give "complete relief" to make a successful plaintiff whole (see point 2, *infra*), such an award is an appropriate federal supplement to the state-provided relief (*Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 421).

2. Use Of Private Counsel Is Essential In The New York Proceedings To Preserve Federal Rights

The New York state procedure, to which plaintiff was required to resort, mandates adversarial quasi-judicial hearings leading to findings of fact, administrative appeals, and judicial review. Participation by the aggrieved person's attorney at each of these stages is an important means of preserving federal rights under Title VII and 42 U.S.C. 1981 and of obtaining the relief to which those statutes entitle him.[21]

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[21]Section 706(k) and 42 U.S.C. 1988 explicitly provide fees for "any action *or* proceeding" (emphasis supplied) and thus are not limited to judicial actions. *Johnson* v. *United States*, 554 F. 2d 632 (4th Cir. 1977). While "proceedings" is used in Sections 706(i) and 706(j) of Title VII, 42 U.S.C. 2000e-5(i) and 2000e-5(j), to refer to

a. Representation by counsel at the administrative proceedings in New York is crucial because the administrative hearing establishes an evidentiary record and results in findings that have a binding effect on the parties in subsequent federal litigation.

The state administrative proceedings, and their attendant judicial review, are very similar to federal administrative proceedings under Section 717 of Title VII, 42 U.S.C. 2000e-16, for which the presence of the aggrieved person's attorney has been deemed appropriate and the attorney's time compensable.[22] As one court of appeals has explained:

> For a conscientious lawyer representing a federal employee in a Title VII claim, work done at the administrative level is an integral part of the work necessary at the judicial level. Most obviously an attorney can investigate the facts of his case at a time when investigation will be most productive. The attorney may thus gain the familiarity with the facts of the case that is so important in the fact-intensive area of employment discrimination. Perhaps even more important, the administrative proceedings allow the attorney to help make a

court proceedings, Sections 706(b) and 706(c), 42 U.S.C. 2000e-5(b) and 2000e-5(c), refer repeatedly to state and local "proceedings." Thus, the term "proceedings" as used in Section 706(k) is broad enough to cover both court actions and state and federal administrative activities. Compare 42 U.S.C. 2000a-3(b), limiting awards solely to any action under that statute. Three courts of appeals have interpreted Section 706(k) to permit awards of attorney's fees for representation at federal administrative hearings under Title VII. *Fischer* v. *Adams*, 572 F. 2d 406 (1st Cir. 1978); *Foster* v. *Boorstin*, 561 F. 2d 340 (D.C. Cir. 1977); *Parker* v. *Califano*, 561 F. 2d 320 (D.C. Cir. 1977); *Johnson* v. *United States*, 554 F. 2d 632 (4th Cir. 1977).

[22]See cases cited *supra*, note 21.

> record that can be introduced at any subsequent District Court trial.[33] Especially in an instance where development of a thorough administrative record results in an abbreviated but successful trial, refusing to award attorneys' fees for work at the administrative level would penalize the lawyer for his pretrial effectiveness and his resultant conservation of judicial time.
>
> [33]The Supreme Court pointed out in *Chandler* v. *Roudebush*, [425 U.S. at 863 n. 39]:
>
> > Prior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial de novo. See Fed. Rule Evid. 803(8)(C). *Cf. Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 60 [1975]. . . .

Parker v. *Califano*, *supra*, 561 F. 2d at 333.[23]

The district court and the dissent below concluded (Pet. App. A16-A18; A. 27) that private persons need not appear by counsel at the state level because attorneys employed by the state are available at the hearing. But the state does not provide attorneys during the initial investigation to represent an aggrieved person. And even though Division attorneys may appear at the subsequent hearing, that is not justification for denying attorney's fees to counsel for the person aggrieved. In an analogous situation, Congress gave persons an absolute right to intervene in civil actions brought on their behalf under

[23]Moreover, "[e]ven when discrimination is patent, an employee might view his Title VII rights as not 'worth' enforcing if he knew he would have to bear the cost of attorneys' fees for the administrative proceedings that are a necessary first step." *Parker* v. *Califano*, *supra*, 561 F. 2d at 334.

Title VII by the EEOC or the Attorney General (Section 706(f)(1), 42 U.S.C. 2000e-5(f)(1)). It cannot be seriously doubted that in that situation, Congress intended that attorney's fees would be awarded to successful intervening plaintiffs for work reasonably performed by private counsel, notwithstanding the voluntary nature of the intervention. The same is true at the state level. Sections 706(f)(1) of Title VII and 297(4)(a) of the New York Human Rights Act, N.Y. Exec. Law (McKinney 1972-1978 Supp.), both reflect legislative understanding that public agencies vindicating vital public interests may not adequately represent the individual, because the interests of the government and the narrower interest of the individual often diverge. See *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 537-539 (1972). When this occurs, government attorneys have paramount duties to their employer, not to the individual, as the state regulations and its affidavits in this case make plain (A. 60-61; Opp. App. 15a-18a; see also Division Amicus Br. 4-8). Moreover, in state proceedings, while attorneys representing the state are concerned only with enforcing state law, private counsel have the additional duty of ensuring that the record created at the state hearing will support pending or subsequent federal litigation.[24] Furthermore, "[s]ettlement of the charge is possible at any stage of the proceedings and agreements may, accordingly, have to be negotiated and rights may be waived." *Parker* v. *Califano*, *supra*, 561 F. 2d at 332.[25]

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[24]For example, private counsel may wish to assure that the record is adequate to meet differences in federal substantive law or in the applicable burden of proof.

[25]See note 14, *supra*.

b. Private counsel is also vital at the state judicial review stage in order to protect the charging party's federal rights. If the charging party chooses to seek review in the state courts, the determinations of the state court have been held in the Second Circuit to have "res judicata" effects with respect to subsequent federal actions under Title VII and Section 1981. *Sinicropi* v. *Nassau County*, 601 F. 2d 60 (2d Cir. 1979); *Mitchell* v. *National Broadcasting Co.*, 553 F. 2d 265 (2d Cir. 1977). But cf. *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 60 & n.21. If, in choosing to go to a forum in which attorney's fees are not available, the charging party were held to that choice, as the district court suggests (Pet. App. A27), the net result undoubtedly would be to encourage the bringing of actions in the federal, rather than the state, courts; but at least in that situation the charging party would have the benefit of choice.

Where, however, the decision of the state appellate review board is in favor of the charging party, that party may be brought into the state courts against his will. As in this case, the decision to go to the state court is then made by the employer, not the charging party. It is true that a Division attorney will represent the state in that proceeding but, as the Division affidavits and brief (A. 60-61; Division Amicus Br. 6) make clear, the state attorney again appears in support of the administrative determination rather than the complainant.[26] Moreover, if a favorable decision by the Division is reversed, the Division attorney is unable to represent the charging

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[26]The difference in position may be substantial. For example, respondent here could have challenged the agency decision to dismiss the charges against petitioner's assistant manager, or to limit her back pay award to $52 a week. In deciding not to do so, she had the advice of counsel devoted solely to her own individual interests.

party in the state courts (A. 61). Thus, a charging party has no assurance that in state proceedings his rights will be adequately protected by Division counsel.

Petitioner argues that under the circumstances of this case, no conflict arose. An aggrieved individual approaching the New York administrative system cannot, however, foresee that he will prevail at all stages, and that no conflict will arise. The potentiality of a conflict is what requires a complainant to seek private counsel, as respondent did here—where, indeed, a conflict could have materialized (see note 26, *supra*).

3. The Award Of Attorney's Fees To Parties Who Prevail In State Proceedings Furthers The Effective Operation Of Title VII

If a prevailing complainant, who has made full and effective use of the state proceedings, is denied attorney's fees, that complainant is, in effect, penalized for pursuing the state remedy diligently. Respondent could have abandoned state proceedings; obtained an EEOC right to sue letter after 180 days; and attempted to litigate the merits of her claim in federal court. She then unquestionably would have been eligible for an award of attorney's fees. If she were not similarly entitled to a complete attorney fee award now, covering substantially all the legal work required, she would be penalized for making full and effective use of the state proceedings, the initial use of which is required by Title VII and the continued use of which is encouraged by EEOC procedures and by the practical difficulty of obtaining prompt relief from the EEOC because of its workload.

A reversal of the judgment below would tend to discourage the use of state proceedings. Complainants with counsel would be motivated to minimize their efforts at the state level, and to concentrate instead on

suit in the federal courts. An increase in litigation of Title VII and Section 1981 suits on the merits would, of course, involve vastly more federal judicial time and resources than would applications for attorney's fees.

Such a holding would also result in a longer period between the discriminatory event and development of a record. A record developed promptly is of substantial importance in a decisionmaker's ability to evaluate the facts in an employment discrimination case. A holding that would deprive litigants of the incentive, and perhaps the ability, to develop a record adequately and promptly would inhibit the goal of speedy resolution of employment discrimination charges.

In sum, since the charging party was required under Title VII to submit to a state procedure in which the assistance of counsel is reasonably necessary to vindicate federally protected rights, the court below correctly held that attorney's fees for work performed in the state proceedings should be awarded under Title VII.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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JANUARY 1980

DOJ-1980-01

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-192

NEW YORK GASLIGHT CLUB, INC. and JOHN ANDERSON, Manager of the NEW YORK GASLIGHT CLUB, INC.,

Petitioners,

v.

MS. CIDNI CAREY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE PUERTO RICAN LEGAL DEFENSE & EDUCATION FUND, INC. AS *AMICUS CURIAE*

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BRIEF OF THE PUERTO RICAN LEGAL DEFENSE & EDUCATION FUND, INC. AS *AMICUS CURIAE*

Interest of *Amicus Curiae**

This brief is submitted on behalf of the Puerto Rican Legal Defense & Education Fund, Inc., as *Amicus Curiae*, urging affirmance of the decision of the Second Circuit Court of Appeals. Applying a thorough and astute analysis, that Court held that an aggrieved plaintiff is entitled to recover attorney's fees in federal court under

* Letters of the Petitioners and Respondent giving their consent to file this brief have been filed with the Clerk of this Court.

Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), for the successful prosecution of an employment discrimination complaint in a state administrative proceeding pursuant to a deferral by the Equal Employment Opportunity Commission ("EEOC") under 42 U.S.C. § 2000e-5(c).

The Puerto Rican Legal Defense & Education Fund, Inc. ("Fund") is a non-profit, tax-exempt public interest organization, dedicated to protecting and advancing the civil and constitutional rights of Puerto Rican and other Hispanic-Americans through litigation and other legal processes.

The Fund has a significant interest in the outcome of this case. Many Puerto Rican and other Hispanic-Americans who suffer employment discrimination seek assistance from the Fund. To the extent its limited resources allow, the Fund has represented, and expects to continue to represent these parties. On occasion, the Fund has received an award of attorney's fees from the courts. Reversal of the decision below will deny the Fund, and all similar organizations, an important source of revenue to pursue these cases. (This revenue is particularly important at a time when economic constraints may cause some groups to contribute less to the Fund than they have in the past.) Indeed, reversal here may ultimately result in less vigorous enforcement of fair employment laws generally.

For example, the Fund presently represents at least two complainants pursuing employment discrimination claims before state administrative tribunals, in cases which are procedurally identical to this case. If successful on the merits, these complainants, applying the legal principle enunciated by the Second Circuit in this case, will have the opportunity to recover full relief by moving for attorney's fees in federal court. If this decision is not affirmed, these complainants, and thousands more, will be

denied full relief; and that consequence will dissuade lawyers from taking such cases in the future.

Moreover, affirmance here would induce more private law firms to represent individuals who are the victims of employment discrimination. Representation of employment discrimination victims by the private bar would not only assist in the struggle against discrimination in employment, but would also have the salubrious effect of exposing a larger segment of the bar to this extremely important area of public interest litigation. *See* Nussbaum, Attorney's Fees in Public Interest Litigation, 48 N.Y.U. Law Review 301, 305-11 (1973).

ARGUMENT

Section 706 of Title VII of the Civil Rights Act of 1964 authorizes the award of attorney's fees for the successful prosecution of employment discrimination cases in state administrative proceedings pursuant to a deferral by the EEOC.

I. Title VII's Attorney's Fees Provision Should Be Liberally Construed

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of "race, color, religion, sex or national origin." 42 U.S.C. § 2000e *et seq.* Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), provides for a court to award reasonable attorney's fees to a prevailing party "[i]n any action or proceeding under this subchapter."

Congress' purpose in enacting this section providing for the award of attorney's fees was to encourage victims of employment discrimination to bring legal proceedings to vindicate their rights. By removing the burden of requiring them to pay their own legal fees, Congress reasoned, victims of employment discrimination will be more likely to

seek legal redress. *Parker* v. *Califano,* 561 F.2d 320, 328 (D.C. Cir. 1977); *McMullen* v. *Warner,* 416 F. Supp. 1163, 1167 (D.D.C. 1976); *Cf. Lea* v. *Cone Mills Corporation,* 438 F.2d 86, 88 (4th Cir. 1971); *See also Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968). Thus, in *Piggie Park,* this Court in construing Title II's attorney fee provision (which is similar to, but narrower than that in Title VII) stated that:

> "When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of spurring broad compliance with the law. . . ."
>
> "Congress . . . enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II." 390 U.S. 400, 401, 402, 88 S.Ct. 964, 966, 19 L. Ed. 21 1263, 1265-1266 (1968) (footnotes omitted).

In construing the attorneys' fees provision of Title VII, the Fifth Circuit in *Johnson* v. *Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974), also favored a broad interpretation:

> "This Court, as part of its obligation 'to make sure that Title VII works,' has liberally applied the attorney's fees provision of Title VII, recognizing the importance of private enforcement of civil rights legislation." *Id.* at 716 (footnote omitted).

Thus, Section 706(k) should be liberally construed to achieve its remedial purpose. *Mahroom* v. *Hook,* 563 F.2d 1369, 1375 (9th Cir. 1977), and cases cited.

II. Proceedings In State Agencies Which Follow Deferral By The EEOC Are Within The Scope Of Cases In Which Title VII Provides For An Award Of Attorney's Fees

Section 706(k) provides in pertinent part that:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs. . . ."

The language of the statute, expressly providing for recovery of attorney's fees in any "action or proceeding," demonstrates that Congress did not intend to restrict the recovery of attorney's fees to actions instituted in court but intended to include *proceedings* brought before administrative tribunals as well. *Johnson* v. *United States,* D. Md. Civil Action No. H-74-1343 (June 8, 1976), slip op. at 7, 12 Empl. Prac. Dec. (CCH) ¶11,039, at 4841, *affirmed,* 554 F.2d 632 (4th Cir. 1977). Such a reading of the statute comports with the principle of statutory construction requiring that statutes be interpreted to avoid redundancy. *Rockbridge* v. *Lincoln,* 449 F.2d 567, 571 (9th Cir. 1971). If Congress did not intend to include the award of attorney's fees in administrative proceedings, there would have been no need to include the language "or proceeding." *Parker* v. *Califano,* 561 F.2d at 325.*

The question remains, however, as to whether an action or proceeding "under this subchapter" includes a proceed-

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* Cases in which courts have permitted the award of attorney's fees in Title VII administrative proceedings include *Fischer* v. *Adams,* 572 F.2d 406 (1st Cir. 1978); *Foster* v. *Boorstin,* 182 U.S. App. D.C. 342, 561 F.2d 340 (1977); *Parker* v. *Califano,* 182 U.S. App. D.C. 322, 561 F.2d 320 (1977); *Johnson* v. *United States,* 554 F.2d 632 (4th Cir. 1977); *Noble* v. *Claytor,* 448 F. Supp. 1242 (D.D.C. 1978); *Smith* v. *Califano,* 446 F. Supp. 530 (D.D.C. 1978); and *McMullen* v. *Warner,* 416 F. Supp. 1163 (D.D.C. 1976).

ing instituted before a state administrative tribunal after referral by the EEOC. An examination of 42 U.S.C. §§ 2000e-5(c)-(f) compels an affirmative answer.

In New York, the EEOC must defer all complaints initially to the New York State Division of Human Rights ("State Division") as mandated by 42 U.S.C. § 2000e-5(c). *Oscar Meyer & Co.* v. *Evans,* —— U.S. ——, 99 S.Ct. 2066, 2071 & n.3, 60 L. Ed. 2d 609, 615 & n.3 (1979). In accordance with the policy of enforcement enumerated in Title VII, the EEOC holds that complaint "in suspended animation" while the State Division is given an opportunity to consider the complaint. *Love* v. *Pullman Co.,* 404 U.S. 522, 526, 92 S.Ct. 616, 618, 30 L. Ed. 2d 679, 684 (1972). At the end of the sixty days after deferral to the State Division (unless the proceeding has terminated earlier) or subsequently, *e.g.,* at the conclusion of the state proceedings, the EEOC commences action on the matter. Thereafter, the EEOC:

> "investigates; if it finds no reasonable cause to believe the charge is true, it dismisses the charge, but if it finds reasonable cause it attempts conciliation. 42 U.S.C. Section 2000e-5(b). If conciliation fails, the Commission can institute a civil action against the respondent. 42 U.S.C. Section 2000e-(5)(f) (1). If the EEOC dismisses the charge, or if after 180 days after filing the Commission has neither effected conciliation nor instituted a civil action, it is to notify the aggrieved party, who has 90 days after the giving of such notice to commence an individual civil action." *Weise* v. *Syracuse University,* 522 F.2d 397, 411-412 (2nd Cir. 1975).

In sum, deferral to the State Division is an integral part of the enforcement process under Title VII, 42 U.S.C. § 2000e-5(c). *See Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L. Ed. 2d 147, 155-156 (1974); *Voutsis* v. *Union Carbide Corporation,* 452 F.2d 889, 892 (2nd Cir. 1971), *cert. denied,* 406 U.S. 918, 92 S.Ct. 1768, 32 L. Ed. 2d 117 (1972). Thus, because the term "under this subchapter" includes deferral to the State agency, there can be no question that Section 706(k) provides for attorney's fees for proceedings deferred to the State agency by the EEOC.

III. Title VII Remedies, Including The Provision For Attorney's Fees, Are Designed To Supplement State Administrative Remedies

It is absolutely clear that Congress provided for the full panoply of remedies under Title VII to augment state administrative remedies which proved inadequate. Thus, in *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 48-49, 94 S.Ct. 1011, 1020, 39 L. Ed. 2d 147, 158 (1974), this Court stated that "[t]he clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." Similarly, in *Voutsis* v. *Union Carbide Corporation,* 452 F.2d 889, 893 (2nd Cir. 1971), *cert. denied,* 406 U.S. 918, 92 S.Ct. 1768, 32 L. Ed. 2d 117 (1972), the Second Circuit explained the unique status of Title VII claims:

> "The Congressional policy here sought to be enforced is one of eliminating employment discrimination, and the statutory enforcement scheme contemplates a resort to the federal remedy if the state machinery has proved inadequate. The federal remedy is independent and cumulative . . . and it facilitates comprehensive relief."

Accord, Al-Hamdani v. *State University of New York,* 438 F. Supp. 299, 302 (W.D.N.Y. 1977).

Since the State Division did not afford the respondent full relief under Title VII, she certainly was entitled to secure that relief in federal court.

IV. The Practical Salutary Consequences Of The Decision Below Dictate Its Affirmance

First, Petitioner's arguments to the contrary notwithstanding, an award of attorney's fees to Respondent will not impinge on the inherent power of the states or conflict with New York State's statutory scheme, Section 297 (4) (a) of the Executive Law of the State of New York. Quite the contrary, affirmance of the decision below will facilitate the use of state proceedings because an individual will be compensated for the expense incurred at the state level. Denial of attorney's fees to parties such as Respondent would only serve to reduce or eliminate attempts to resolve cases at the state level and increase litigation in the federal courts. Rather than attempt to resolve anything at the state level, an aggrieved party would be more likely to abandon the administrative proceeding and institute his action in federal court at the earliest possible moment. As stated in *Smith* v. *Califano,* 446 F. Supp. 530, 534 (D.D.C. 1978):

> "a party who knew he could recover all fees once he got to court but would recover none if he prevailed at the administrative level would rush to court . . . rather than wait for a final agency decision. . . . Thus, the administrative proceeding [required by Title VII] might be relegated to a pro forma exhaustion step decreasing the likelihood that claims could be resolved without resorting to the courts."

Further, in the situation posited by the court in *Smith,* the federal court would have to decide the merits of complainant's claims on an incomplete or absent administrative record, occasioning further loss of time and money for everyone.

Second, energetic work by motivated counsel at the state administrative level plays a very significant role in determining whether a victim of employment discrimination is

ultimately successful. The state courts usually give great deference to the factual findings of the administrative tribunal.* The absence of an attorney for the complainant at this level may result in adverse findings. *Cf. Guzman* v. *Califano,* S.D.N.Y., 79 Civ. 0606 (ADS) (November 16, 1979), slip op. at 1 ("the legal profession has come to recognize that administrative law cases, particularly for social benefits, are usually won or lost in the agency process.")

As explained by the Court of Appeals below (Appendix at 11), under the New York statute, attorneys for the State Division represent the "case in support of the *complaint*" (emphasis supplied) not the *complainant.* They may or may not at all times represent the interests of the complainant. Depending upon case load, the State Division attorney may or may not be able to devote the time necessary to adequately represent all of the complainant's interests. To the extent that impossibility of recovering reasonable attorney's fees dissuades other lawyers from handling these types of cases, or makes it more difficult for them to do so, complainants—and the public interest in ending employment discrimination—suffer.

V. This Is An Appropriate Case For An Award Of Attorney's Fees

Petitioner argues that the District Court's decision (Appendix at 24) was purely discretionary, and that the Court of Appeals could only reverse that decision based on a finding of abuse of discretion. This argument misses the point.

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* Similarly, the EEOC, in determining whether there is reasonable cause to believe the charge is true and whether they should pursue enforcement of the matter or dismiss the charge, are required to "accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law." 42 U.S.C. § 2000e-5(b).

Notwithstanding that the award of attorney's fees is discretionary, it is not subject to unbridled discretion. On the contrary, as this Court stated in *Christiansburg Garment Co.* v. *EEOC,* 434 U.S. 412, 416-17, 98 S.Ct. 694, 698, 54 L. Ed. 2d 648, 653-654 (1978), citing *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L. Ed. 2d 1263 (1968), a prevailing plaintiff under Title VII, just as a prevailing plaintiff under Title II,
Park Enterprises, 390 U[illegible]. 400, 402, 88 S.Ct. 19 L. Ed. 2d 1263 (1968), a prevailing plaintiff under Title VII, just as a prevailing plaintiff under Title II,

> "'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'"

There are no special circumstances in this case which would render such an award unjust. Petitioner's contention that a public interest law firm is somehow less deserving of attorney's fees than a private law firm is particularly fallacious. The statute makes no provision for different treatment of public interest and private firms, and the cases hold that such different treatment is not proper. *Reynolds* v. *Coomey,* 567 F.2d 1166, 1167 (1st Cir. 1978); *Rodriguez* v. *Taylor,* 569 F.2d 1231, 1245 (3d Cir. 1977), *cert. denied,* 436 U.S. 913, 98 S.Ct. 2254, 56 L. Ed. 2d 414 (1978); *Lea* v. *Cone Mills Corporation,* 438 F.2d 86 (4th Cir. 1971). *See* Vaas, Title VII: Legislative History, 7 Boston College Industrial and Commercial Law Review 431, 502 (1966). As stated by the First Circuit in *Reynolds:*

> "Attorney's fees are, of course, to be awarded to attorneys employed by a public interest firm on the same basis as to a private practitioner."

567 F.2d at 1167.* In *Rodriguez,* the Third Circuit, permitting the award of attorney's fees to Community Legal Services, Inc., a non-profit Pennsylvania corporation, stated:

> "Legal services organizations often must ration their limited financial and manpower resources. Allowing them to recover fees enhances their capabilities to assist in the enforcement of congressionally favored individual rights. *See Hairston* v. *R&R Apartments,* 510 F.2d 1090, 1092-93 (7th Cir. 1975); *Palmer* v. *Columbia Gas of Ohio, Inc.,* 375 F. Supp. 634, 636 (N.D. Ohio 1974); *Jones* v. *Seldon's Furniture Warehouse, Inc.,* 357 F. Supp. 886, 887-88 (E.D. Va. 1973); Note, Awards of Attorney's Fees to Legal Aid Offices, 87 Harv. L.Rev. 411, 413-14 (1973). Moreover, assessing fees against defendants in all circumstances may deter wrongdoing in the first place. See *Jones* v. *Seldon's Furniture Warehouse, Inc., supra.*"**

569 F.2d at 1245.

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* *See generally,* Legislative History of Attorney's Fees Awards Act of 1976, 5 U.S. Code Cong. & Admin. News 5909-13 (1976). (The Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, is governed by the same standards in the award of attorney's fees as the attorney's fee provision of the 1964 Civil Rights Act. *Id.* at 5912.)

** *See also* House of Representatives Report on The Civil Rights Attorney's Fees Awards Act of 1976, H.R. REP No. 94-1558, 94th Cong., 2d Sess. 8, n.16 (1976) which states that a prevailing party is entitled to attorney's fees even if represented by an organization, citing with approval *Incarcerated Men of Allen County Jail* v. *Fair,* 507 F.2d 281 (6th Cir. 1974) (award of legal fees to private non-profit legal services organization, partially supported by public funds, permitted); *Torres* v. *Sachs,* 69 F.R.D. 343 (S.D.N.Y. 1975), *aff'd,* 538 F.2d 10 (2d Cir. 1976) (award of legal fees to the Fund permitted); and *Fairley* v. *Patterson,* 493 F.2d 598 (5th Cir. 1974) (held that award of attorney's fees and expenses could not be reduced because appellant's attorney was employed or funded by a civil rights organization and/or a tax exempt foundation. *Id.* at 606). *See generally,* Hearings Before the Subcom. on Representation of Citizen Interests of the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess., Parts 3 and 4 (1973).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Dated: New York, New York
December 20, 1979

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-192

NEW YORK GASLIGHT CLUB, INC., and JOHN ANDERSON, Manager of the NEW YORK GASLIGHT CLUB, INC.,

Petitioners,

against

Ms. CIDNI CAREY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION BY NEW YORK STATE DIVISION OF HUMAN RIGHTS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR NEW YORK STATE ATTORNEY GENERAL AND NEW YORK STATE DIVISION OF HUMAN RIGHTS AS *AMICI CURIAE*

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The New York State Division of Human Rights hereby moves this Court to accept for filing the attached proposed *amicus curiae* brief, jointly presented by the New York State Attorney General and the New York State Division of Human Rights, as *amici curiae*.

Consent to the filing of a brief *amicus curiae* by the New York State Division of Human Rights was granted by

James I. Meyerson, Esq. counsel for respondent Ms. Cidni Carey, by letter dated December 18, 1979.

Consent to the filing of a brief *amicus curiae* by the New York State Division of Human Rights was declined orally by Albert N. Proujansky, Esq. counsel for petitioners New York Gaslight Club, Inc. and John Anderson.

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TABLE OF AUTHORITIES

IN THE

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Ms. CIDNI CAREY,

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR NEW YORK STATE ATTORNEY GENERAL AND NEW YORK STATE DIVISION OF HUMAN RIGHTS, AS *AMICI CURIAE*

Interest of *Amici Curiae*

The *amicus* Attorney General, pursuant to his responsibilities as chief legal officer of the State under New York State Executive Law § 63, has a vital interest in protecting

the citizens of the State by insuring effective enforcement of the laws prohibiting discrimination in employment.

Pursuant to its authority under the Human Rights Law, Article 15 of the New York Executive Law ("HRL"), and as the nation's oldest fair employment practices commission, entrusted since 1945 with enforcement of the New York anti-discrimination statute, the interest of the *amicus* State Division of Human Rights ("Division") is to provide the Court with an accurate account of the law and the Division's rules and practices. The Division has an obvious interest also in maximizing the effectiveness of its efforts to enforce State law prohibiting discrimination.

The issue before this Court in the above-entitled action has serious implications for enforcement of State law against discrimination.

Until the Second Circuit's decision below, victims of discrimination in employment in the State of New York who chose to pursue their legal rights and remedies faced a dilemma. Under Section 706 of Title VII of the Civil Rights Act of 1964, 42 USC 2000e-5(c), such persons are required to initiate their complaints with the Division. Complainants appearing before the Division *pro se* confront respondent employers customarily represented by counsel. Complainants who obtained private legal assistance, even if successful, could not recover under New York State law the money spent on legal fees. Their only opportunity to recoup such fees was to abandon their State complaints completely after reaching the final stage of the State administrative process and to reassert all of their substantive claims in a new proceeding commenced in a federal forum. If they were then successful, attorney's fees would be granted. This two-step procedure placed an unconscionable burden upon already victimized complainants by forcing them to resubmit their proof in a second action.

The decision below, if sustained by this Court, by encouraging complainants to the Division to obtain private counsel at an early stage of the case, will result not only in more frequent vindication of complainants' rights, but also will avoid extensive litigation before the Division through more realistic evaluation of the case for purposes of commencing an action or efforts at settlement.

ARGUMENT

The granting of counsel fees by federal courts to private attorneys who have successfully represented complainants before the Division is sanctioned by law and public policy.

Title VII provides that an appropriate state or local agency be given the first opportunity to resolve complaints in jurisdictions where a state or local law prohibits the alleged unlawful employment practice. 42 USC § 2000e-5(c). Such deferral is consistent with according the highest priority to the national policy against discrimination. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *Alexander* v. *Gardner-Denver Company*, 415 U.S. 36, 47 (1974).

In the State of New York, the Division is an appropriate deferral agency. Division attorneys do not, however, represent the complainant in administrative proceedings brought pursuant to the Human Rights Law. While this was correctly recognized by the majority of the Court below, it was misunderstood by both the dissenting judge below and by the judge in the Southern District of New York.[1] Judge Werker's statement that "The plaintiff had the option of pursuing her state administrative remedies without incurring any expenses at all for legal services" inadvertently overstated and misconstrued the Human Rights Law, the Division's Rules, and its actual practices.

When a complaint is filed and investigated, the Human Rights Law makes no provision for the appearance of a Division attorney, nor do the Division's Rules of Practice, Title 9 New York Code of Rules and Regulations, part 465 ("NYCRR"), sanction such activity. Section 297.1 does,

1. An argument perpetuating this serious misunderstanding has been advanced by petitioners on pp. 6-7 of their brief. Petitioners, in relying upon a misquoted section of the HRL, argue that the State of New York provides for the "prosecution of complaints." In failing to cite the section accurately, and substituting the term *complaint* for *complainant*, petitioners have also failed to grasp the basic reason why complainants require the assistance of private counsel, to present "the case in support of the complainant."

Petitioners further this misunderstanding by their reference on p. 6 of their brief to § 297.4(a) as antecedent to Title VII. In fact, prior to 1964, Article 15 of the N.Y. Executive Law did not provide for the appearance of private counsel. The complainant, in person or by counsel, was permitted only to "intervene" at the hearing in the discretion of the Division. New York Laws of 1945, ch. 118, § 1. The present language of the Human Rights Law, recognizing complainants as parties, was enacted in 1968. N.Y. Session Laws of 1968, ch. 958, § 6.

however, provide for the participation of private counsel, and private counsel frequently represent complainants during this early stage, where either a finding of probable cause or dismissal for no probable cause is made (HRL § 297.2). The finding of probable cause after investigation is a necessary prelude to the public hearing. At no time is a complainant represented by a Division attorney at this preliminary level.

Investigation is followed by attempts at conciliation, still with no Division attorney present. The Division staff is empowered, with unreviewable discretion, to execute a conciliation agreement reached with the respondent and to dismiss the complainant's objections thereto for administrative convenience (HRL § 297.3).

If no conciliation is reached and a hearing is scheduled, a Division attorney appears if the complainant has not retained private counsel. Consent to the presentation of the complaint solely by private counsel is granted routinely and informally unless there is a substantial public interest. The Division's Rules of Practice, 9 NYCRR pt. 465.11, were revised in 1977 to reflect this new practice.

In any event, the Division attorney does not represent the complainant in settlement discussions taking place at a hearing. Stipulations may be demanded by respondents which affect a complainant's rights and interests beyond the complaint to the Division. A demand commonly made by respondents as a term of settlement is the execution by complainant of a written release of all existing claims, state and federal, against the company, and the withdrawal

of a charge before the Equal Employment Opportunity Commission. The Division attorney is not in a position to advise a complainant whether to sign such a release.

Finally, at the appellate level, the Division attorney appears to support orders issued by the Division and the State Human Rights Appeal Board and to seek enforcement pursuant to HRL § 298. The Division attorney represents only the Division and the Commissioner, and cannot represent a complainant on an appeal from an order of the Commissioner adverse to the complainant. The complainant must appeal from such an order either by private counsel or *pro se*.[2] See *Mize* v. *State Division of Human Rights,* 33 N.Y. 2d 53 (1973); *Molin* v. *State Division of Human Rights,* —— A.D. 2d ——, 359 N.Y.S. 2d 241 (2d Dept. 1974); *Metropolitan Transportation Authority* v. *State Division of Human Rights,* 50 A.D. 2d 821 (2d Dept. 1975). In addition, the Division cannot appeal from an order of the State Human Rights Appeal Board reversing the Division order. *State Division of Human Rights* v. *State Human Rights Appeal Board,* —— A.D. 2d —— (4th Dept.), *mot. for lv. to app. den.,* 46 N.Y. 2d 705 (1978). A complainant aggrieved by the Board's reversal must seek private counsel or act *pro se* to pursue judicial review.

2. In *Sinicropi* v. *Nassau County,* 601 F. 2d 60 (2d Cir.), cert. denied, 48 U.S.L.W. 3372 (Dec. 4, 1979), the Court dismissed a *pro se* federal complaint brought pursuant to Title VII on grounds of *res judicata* after the Division and the New York appellate courts had dismissed an identical *pro se* complaint. Thus, complainants litigating without counsel in New York tribunals may be put at an ever greater disadvantage. See also *Kremer* v. *Chemical Construction Corp.,* 477 F. Supp. 587 (S.D.N.Y. 1979).

State Division of Human Rights v. *Department of Correctional Services,* 61 A.D. 2d 25 (4th Dept. 1978).[3]

From the foregoing recital it is apparent how limited is the representation given to a complainant by the legal staff of the State Division. The existence of Title VII, and the strong body of case law under that enactment, have given rise to several pertinent phenomena in recent years:

1. An extreme increase in caseload, a "doubling and redoubling" (affidavit of Adele Graham, A58, A59);
2. The almost invariable participation by experienced attorneys representing respondents at all phases of

3. The chart below summarizes and clarifies the roles of the Division and private attorneys in Human Rights Law actions:

Stage	*Division Attorney Participation*	*Private Attorney Participation*
1. File Complaint		x
2. Investigation		x
3. Conciliation		x
4. Public Hearing with Private Attorney		x
4a. Public Hearing, No Private Attorney	x	
4b. Public Hearing, Substantial Public Interest	x	x
5. Appeal to Appeal Board from Favorable Order After Hearing	x	x
6. Appeal to Appeal Board from Unfavorable Order After Hearing		x
7. Appeal to Court from Order After Hearing Sustained by Board	x	x
8. Appeal to Court from Order After Hearing Reversed by Board		x

the Division proceedings, from investigation to conciliation to hearing to appeal; and

3. The rise of a complainants' bar.

During this same period of increasing demand on Division attorneys' time and on the State's financial resources, well-documented budgetary problems have prevented staff increases necessary to handle the increased caseload. Of necessity, the Division supports and encourages the participation of private counsel.

The State's inability to supply legal assistance at all stages of the compaint processing makes the award of attorney's fees by federal courts to lawyers representing prevailing complainants in Division proceedings a necessary, logical and appropriate conclusion to such proceedings consistent with the integrated federal-state scheme embodied in Title VII. *Love* v. *Pullman,* 404 U.S. 522 (1972); *Marshall* v. *Communication Workers of America,* 21 Empl. Prac. Dec. (CCH) ¶ 30,318 (D. D.C. 1979). See *Noble* v. *Claytor,* 448 F. Supp. 1242, 1248 (D. D.C. 1978); *Parker* v. *Califano,* 561 F. 2d 320 (D.C. Cir. 1977); *Bucyrus-Erie Co.* v. *Dept. of Industry,* 549 F. 2d 205 (7th Cir. 1979), *pet. for cert. filed,* 48 U.S.L.W. 3181 (U.S. Aug. 16, 1979) (No. 79-258).

Where a state anti-discrimination statute does not provide for the award of attorneys' fees, their award by a federal court is a corollary remedy.[4] "To require deferral to a

4. Petitioners, citing *State Division of Human Rights* v. *Luppino,* 29 N.Y. 2d 558 (1971), state that the New York State Court of Appeals "did not believe" that § 706(k) of the Civil Rights Act of

(footnote continued on next page)

state for sixty days during which it may provide those forms of relief available under its law does not deprive a litigant of a later opportunity to seek in a federal forum relief not available in the state scheme (citation omitted) . . . [nor does it] require a state to 'clone' federal remedies." *White* v. *Dallas Independent School District,* 581 F. 2d 556, 561 (5th Cir. 1978). See *Oscar Mayer and Co.* v. *Evans,* —— U.S. ——, 99 S.Ct. 2066 (1979).

Failure to award attorney's fees in an action of this nature would bring about the anomalous result that persons discriminated against in states where no deferral agency existed could get complete relief, including attorney's fees, not available to persons in states with deferral agencies which either did not or could not award such fees. *Parker* v. *Califano,* 561 F. 2d 320, 329 n.24 (D.C. Cir. 1977); *Foster* v. *Boorstin,* 561 F. 2d 340, 343 n.8 (D.C. Cir. 1977); *Fischer* v. *Adams,* 572 F. 2d 406, 410 (1st Cir. 1978).

1964, 42 U.S.C. § 2000e-5(k) applied to cases litigated in state court. To our knowledge, this issue has never been raised in a New York State court. In fact, *Luppino, supra,* did not even contain the issue of whether counsel fees should be granted. However, counsel fees are not awarded by the Division under New York State law. See *State Commission for Human Rights* v. *Speer,* 35 A.D. 2d 107 (2nd Dept. 1970), *rev'd on other grounds,* 29 N.Y. 2d 555 (1971).

Conclusion

For the above stated reasons, the decision of the United States Court of Appeals for the Second Circuit should be affirmed.

Dated: New York, New York
December 27, 1979

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1979

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JOHN ANDERSON, Manager of the
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—against—

MS. CIDNI CAREY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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IN THE

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October Term, 1979

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Respondent.

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICUS CURIAE

==========

Interest of the Amicus Curiae*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1940.

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*/ Letters of consent to the filing of this Brief Amicus Curiae are on file with the Clerk of the Court.

It was formed to assist Blacks to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Blacks suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York Court, authorizing the organization to serve as a legal aid society. The NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations**/ and is supported by contributions from the public. For many years its attorneys have represented parties and has participated as amicus curiae in the federal courts in cases involving many facets of the law.

Attorneys employed by the Legal Defense Fund have represented plaintiffs in many cases arising under Title VII of the Civil Rights Act of 1964, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Albemarle Paper Co. v. Moody, 422 U.S 405 (1975). Amicus has also participated in many of the leading cases involv-

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**/ Thus, the Legal Defense Fund has had no connection with the NAACP, which supplied the counsel for respondent in this case, for more than twenty years.

ing attorneys' fees questions, both as counsel, e.g., Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968); Bradley v. School Board of the City of Richmond, 416 U.S 696 (1974); Hutto v. Finney, 437 U.S 678 (1978); and as amicus curiae, e.g., Christiansburg Garment Co. v. Equal Employment Opportunity Comm., 434 U.S. 412 (1978). Therefore, the Fund has a direct interest in the resolution of a number of the issues raised in the present case.

SUMMARY OF ARGUMENT

I.

By its clear language, Title VII authorizes the award of counsel fees for work done in the administrative proceedings that must be exhausted as a precondition to filing an action in federal court. The statute makes no distinction between state and federal agency proceedings, and there is no basis in law or policy for making any.

II.

The Tenth Amendment is no bar to Congress' authorizing fees for work done in state administrative proceedings. The district court's reasons for denying fees herein were insufficient to overcome the presumption in favor of an award.

ARGUMENT

I.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AUTHORIZES THE AWARD OF COUNSEL FEES FOR WORK DONE DURING ADMINISTRATIVE PROCEEDINGS

Amicus urges that the language of 42 U.S.C. § 2000e-5(k) that counsel fees may be awarded to the prevailing party in "any action or proceeding under this subchapter" (emphasis added), compels the conclusion that fees may be awarded for work done during administrative proceedings as well as judicial actions. When § 2000e-5(k) was originally adopted in the 1964 Civil Rights Act, the § 2000e-5 enforcement scheme relied upon both administrative and judicial proceedings. As this Court noted in Alexander v. Gardner-Denver, 415 U.S. 36, 47 (1974):

> [L]egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. In the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a et seq., Congress indicated that it considered the policy against discrimination to be the 'highest priority' . . . Consistent with this view, Title VII provides for consideration of employment-discrimination claims in several forums. See 42 U.S.C. § 2000e-5(b) (1970 ed, Supp. II) (EEOC); 42 U.S.C. § 2000e-5(c) (1970 ed, Supp. II) (state and local agencies); 42 U.S.C. § 2000e-5(f) (1970 ed, Supp. II) (federal courts).

In contrast, the contemporaneous attorney's fees provision in § 204(b) of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), is limited in scope to "any action commenced pursuant to this subchapter." (Emphasis added.) While Title VII's enforcement scheme is both administrative and judicial, Title II's enforcement scheme is strictly court action, see Newman v. Piggie Park Enterprises, 390 U.S 400 (1968). Thus, the specific use of the broadly inclusive phrase "action or proceeding" in § 2000e-5(k) indicates a deliberate decision by Congress to make administrative proceedings subject to attorney's fees and costs awards. Similarly, use of the terms "under this title" ("under this subchapter" in the United States Code) rather than narrower terms limiting applicability to the judicial action provisions indicate that § 2000e-5(k) was intended to apply to the administrative and judicial proceedings in § 2000e-5 enumerated by this Court in Alexander v. Gardner-Denver Co., supra.

Other sections of Title VII, together with their legislative history, make it clear throughout the statute that the word "proceeding" includes administrative, both State and federal,

as well as judicial proceedings. Thus, § 704, 42 U.S.C. § 2000e-3(a), proscribes as "an unlawful employment practice" discrimination by an employer, employment agency or labor organization against an employee, inter alia, "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title" (emphasis added). Statutory language, legislative history, agency construction and case law, all indicate that "proceeding," like the preceding term "investigation" and following term "hearing," refers to EEOC proceedings.[1/]

Congress settled the meaning of "proceeding" in 1972 when § 2000e-3(a) was amended, as the Conference section-by-section analysis described it, "to make clear that joint labor-management apprenticeship committees are covered by those provisions which relate to . . . retaliation against individuals participating in Commission

1/ Rutherford v. American Bank of Commerce, 11 EPD ¶ 10,829 at p. 7488-7489 (D.N.M. 1976), see also, EEOC v. Salvation Army, 3 EPD ¶ 8090 (N.D. Ga. 1970); Barela v. United Nuclear Corp., 462 F.2d 149 (10th Cir. 1972), affirming, 317 F. Supp. 1217 (D.N.M. 1970).

proceedings" (emphasis added).[2/] Similarly, § 716(b), 42 U.S.C. § 2000e-12(b), provides that "[i]n any action or proceeding based on any alleged unlawful employment practice," no person shall be subject to liability or punishment under certain good faith defenses that "[s]uch a defense, if established, shall be a bar to the action or proceeding," notwithstanding certain judical modifications or rescissions (emphasis added). Nothing precludes § 716(b)'s application to EEOC or state deferral agency proceedings.

Sections 706(b), (d) and (e), 42 U.S.C. § 2000e-5(b), (d) and (e), in the 1964 version of the Act and § 706(b), (c) and (e), and § 709(d), 42 U.S.C. § 2000e-5(b), (c), (e) and 8(d), as amended in 1972, specifically refer to state or local deferral proceedings as, inter alia, "proceedings," "state or local proceedings," or "procedure[s]." There simply is no question that such proceedings include administrative proceedings.[3/]

2/ Subcom. on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972 (Comm. Print 1972) at 1849.

3/ See, e.g., Love v. Pullman Co., 404 U.S 522 (1972).

Finally, in the United States Code the term "proceeding" commonly includes administrative proceedings. See, e.g., the Administrative Procedure Act, 5 U.S.C. § 551, et seq.[4/] Indeed, Congress recently amended 5 U.S.C § 6322 concerning leave for federal employees for jury or witness service in a "judicial proceeding," but went so far as to make clear that "[f]or the purpose of this subsection, 'judicial proceeding' means any action, suit, or other judicial proceeding, including any condemnation, preliminary, informational, or other proceeding of a judicial nature, but does not include an administrative proceeding" (emphasis added).[5/]

4/ The APA is cited in Title VII at § 716(a), 42 U.S.C. § 2000e-12(a).

5/ See also 5 U.S.C. § 8125; 18 U.S.C. § 205; 33 U.S.C §§ 923(b), 924, 927 and 928 (provisions in which the term "proceedings" refers to administrative proceedings). Indeed, 18 U.S.C § 205's use of "proceedings", which regulates conflicts of interest by federal officers or employees, has been specifically construed to apply to "an administrative grievance proceeding, such as the EEO complaint procedure," Memorandum To Heads Of Departments And Agencies From Attorney General Edward H. Levi, dated November 20, 1975. 33 U.S.C. § 927 is an unmistakable provision for fees for legal representation before the Employees' Compensation Board of the Department of Labor, compare, Red School House, Inc. v. Office of Economic Opportunity, 386 F. Supp. 1177, 1195-1197 (D. Minn. 1974) (OEO regulations at 45 C.F.R. § 1067.2-5 provide for attorney's fees).

If Congress wanted to limit awards of fees to "proceedings before a court," it well knew how to do so. See, e.g., 42 U.S.C. § 406(b).

Were there doubt about the scope of "proceedings," "Title VII . . . is to be accorded a liberal construction in order to carry out the purpose of Congress to eliminate the inconvenience, unfairness and humiliation of racial discrimination," Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 425 (8th Cir. 1970); Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970).

In cases involving federal employees, the lower courts have correctly applied the principles set out above and have held that the term "proceeding" includes the administrative proceedings that must be exhausted as a condition to filing an action in federal Court. Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977); Johnson v. United States, 554 F.2d 632 (4th Cir. 1977); Fischer v. Adams, 572 F.2d 406 (1st Cir.

6/ cont'd.

1978). Therefore, counsel fees may be awarded for work done during the administrative processing of federal EEO complaints both by the courts and by the agencies responsible for enforcement of Title VII rights. Smith v. Califano, 446 F. Supp. 530 (D.D. C. 1978).

Congress ratified this interpretation of § 2000e-5(k) when it passed the Civil Service Reform Act of 1978, in 5 U.S.C § 7701(g)(2). That section specifically provides that in administrative appeals where Title VII or other discrimination claims are raised and the complainant prevails thereon, counsel fees are to be awarded pursuant to Title VII standards. The Senate report on the bill notes that

> ....statutory law already provides for the award of attorney fees whenever a party in a discrimination suit prevails. The section preserves the right of the Board to award attorney fees ... whenever it finds the employee's rights under the laws prohibiting discrimination have been violated. Sen. Report No. 95-969 (95th Cong. 2d Sess.) p. 61. (Emphasis added). 6/

6/ As originally introduced, both the Senate and House versions of the Civil Service Reform Act of 1978 only provided for counsel fees under a restrictive standard in limited instances where a federal employee won an appeal from, e.g., an agency adverse action. See, 5 U.S.C. § 7701 (g)(1). At hearings it was pointed out that the statute could be interpreted as overruling the

Petitioners in the present case concede the correctness of the above decisions holding that counsel fees may be awarded for administrative proceedings in Federal Title VII cases (Brief for Petitioners at p. 6). There is, however, no basis for distinguishing cases involving private or state and local governmental employer cases, or proceedings before state administrative agencies or the Equal Employment Opportunity Commission.7/ Nothing in the language or the legislative history of § 2000e-5(k) suggests any intent to make such a differentiation between the various administrative proceedings that must be exhausted as a precondition to filing a Title VII action in federal court. Indeed, to the extent

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6/ cont'd.

holding in Smith v. Califano, supra, that agencies could award fees in discrimination administrative proceedings. Thus, § 7701(g)(2) was added to make it clear that the Smith ruling would be preserved.

7/ Under the President's Reorganization Plan No. 1 of 1978, jurisdiction over federal employee EEO complaints was transferrred to the EEOC. Thus, all employees covered by Title VII now must go to the same federal agency to exhaust administrative remedies.

the statute speaks, it mandates that the United States be liable for costs, including attorneys' fees, "the same" as any other party. See, Christiansburg Garment Co. v. EEOC, 434 U.S. 417, 422, n.20 (1978).

Moreover, the policy considerations are the same whether the employer is a federal, state, or local governmental agency or a private company. Congress clearly intended to encourage, in all cases, the administrative resolution and conciliation of complaints. See, Alexander v. Gardner Denver Co., 415 U.S 36 (1974). Full resort to the administrative process would be discouraged, however, if counsel fees could be obtained only for work done in court or in the EEOC. Obviously, counsel can have an important role in state administrative processes, both in attempting to negotiate settlements and in representing clients at hearings. If such efforts cannot be compensated through an award of fees, an attorney would have little choice but to advise a client to short-cut state processes. Complainants would therefore resort to the already unnecessarily over-burdened EEOC and federal courts, a result that would undermine Congress' purpose in requiring that complainants go to state or local agencies in the first place.

II.

THERE ARE NO VALID REASONS NOT TO AWARD FEES FOR STATE ADMINISTRATIVE PROCEEDINGS

Amicus urges that none of the reasons advanced by petitioners in their Brief as to why counsel fees may not be awarded for work done in state or local agency proceedings have any substance. Petitioners first argue that in some way the Tenth Amendment is a bar to Congress' authorizing the payment of counsel fees by private defendants to compensate for work done in a state administrative agency. This Court, however, has already held that Congress has the authority under Section 5 of the Fourteenth Amendment to override the Eleventh Amendment and give the federal courts the power to award counsel fees against a state itself. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Hutto v. Finney, 437 U.S. 229 (1969). Moreover, it has also held that a state court may be required to entertain a federal cause of action to vindicate the civil rights established by 42 U.S.C. §§ 1981 and 1982. Sullivan v. Little Hunting Park, 396 U.S. 229 (1969). Thus, there can be no question of Congress' power under the Fourteenth Amendment to permit the much less in-

trusive remedy of fees paid by private parties in state proceedings.

In the second part of their Brief petitioners discuss issues which, Amicus urges, are not fairly encompased by the questions presented in their petition for a writ of certiorari.[8/] In particular, the question of whether attorneys' fees could have been denied simply because counsel were employed by a public interest law organization was not decided by either of the courts below, nor raised in the petition for a writ of certiorari.[9/] With regard to the general proposi-

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8/ Conversely, the Brief does not discuss all of the questions that are raised by the petition. In particular, it does not discuss at all the third question, whether the respondent was the prevailing party within the meaning of the Act. We would urge that she clearly was since she obtained, administratively, full relief on the merits of her discrimination claim after she had filed her action in federal court. That she no longer had to pursue her claims in court in no way changes the fact that she prevailed on her federal Title VII claim. See, Fischer v. Adams, 572 F.2d 406 (1st Cir. 1978); Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977).

9/ On the merits of the issue, it is clear that the employment status of counsel is irrelevant to whether fees should be awarded. Reynolds v. Coomey, 567 F.2d 1166 (1st Cir. 1978); Torres v. Sachs, 538 F.2d 10 (2d Cir. 1976); Rodriquez v. Taylor, 569 F.2d 1231 (3rd Cir. 1977); Tillman v.

tion regarding the reviewability of the district court's exercise of its discretion in refusing to award fees, it has been clear ever since Newman v. Piggie Park Enterprises, 390 U.S 400 (1968), that such discretion must be guided by proper legal standards. Thus, fees must ordinarily be

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9/ cont'd.

Wheaton-Haven Recreation Association, 517 F.2d 1411 (4th Cir. 1975); Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974); Incarcerated Men of Allen County v. Fair, 507 F.2d 281 (6th Cir. 1974); Hairston v. R & R Apartments, 510 F.2d 1090 (7th Cir. 1975); Brandenburgh v. Thompson, 494 F.2d 885 (9th Cir. 1974). Congress endorsed these decisions when it passed the Civil Rights Attorney's Fee Act of 1976. The House report stated:

> Similarly, a prevailing party is entitled to counsel fees even if represented by an organization or if the party is itself an organization.

H. Rep. No. 94-1558 (94th Cong. 2d Sess.), p. 8, n.16, citing Torres v. Sachs, supra, Fairley v. Patterson, supra and Incarcerated Men of Allen County v. Fair, supra. Petitioners are simply wrong in their assertion that awards of counsel fees are unnecessary to encourage such organizations to take cases. To the contrary, a growing and substantial portion of the income of public interest law organizations, including that of amicus, comes from counsel fee awards. If fees were not available, the litigation programs of such groups would have to be sharply curtailed.

awarded except under exceptional circumstances, none of which are present here. See, Hutto v. Finney, supra.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

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